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In The

Supreme Court of the United States

October Term, 1994

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Petitioner,

vs.

JOSEPH RICHARD REDNER and ROBERT A. BUTTERWORTH,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

RUSSELL W. LaPEER
Counsel of Record
ROBERT R. WHEELER
LANDT, WIECHENS, TROW & LaPEER
Attorneys for Petitioner
P.O. Box 2045
Ocala, Florida 34478-2045
(904) 732-8622

6263
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

131 pp

QUESTIONS PRESENTED

1. Whether the fourfold test of *United States v. O'Brien* should be used in assessing the constitutionality of an ordinance, which prohibits specified sexual activities and regulates the display of nudity in any business establishment, rather than the two-step, prior restraint test of *FW/PBS, Inc. v. City of Dallas*.

2. Whether the court of appeals' error in the present case exhibits the discord and confusion amongst the lower courts in using the two different tests in *Barnes v. Glen Theatre, Inc.* and *FW/PBS, Inc. v. City of Dallas*, to judge the constitutionality of laws regulating establishments displaying nudity, for which this Court must provide guidance to resolve the conflict and establish uniformity.

PARTIES TO PROCEEDINGS BELOW

Petitioner was appellant below, and Respondents were appellees below. The Eleventh Circuit Court of Appeals affirmed the district court's grant of a petition for writ of habeas corpus to Respondent Redner on the basis that the county ordinance, which Respondent Redner was thrice convicted of violating, was an unconstitutional restraint of liberty under the First Amendment to the Constitution.

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Charles S. Dean, Sheriff of Citrus County, Florida, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review and correct its orders entered August 26, 1994 and November 2, 1994.

OPINIONS BELOW AND BASIS OF JURISDICTION

The decisions of the United States Court of Appeals for the Eleventh Circuit are an August 26, 1994 affirmance of the ruling by the district court, that granted a petition for writ of habeas corpus to Respondent Redner, *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1990) (set out as Appendix B of this petition); and a November 2, 1994, order denying a petition for rehearing and suggestion of rehearing *en banc* (set out as Appendix C of this petition).

This Court has jurisdiction to review those decisions, pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

Citrus County, Florida Ordinance 88-05 is contained in Appendix H ("App. H").

STATEMENT OF THE CASE

On March 25, 1988, the Citrus County Board of County Commissioners enacted a temporary ordinance, 88-05, requiring the licensing of all business establishments operating for commercial or pecuniary gain and depicting nudity ("adult entertainment establishments") within the County. Before the end of that month, Respondent Redner was thrice arrested, and then prosecuted, for operating an adult entertainment establishment in Citrus County without a license to do so, in violation of the ordinance.

In defending against those criminal charges, Respondent challenged the constitutionality of ordinance 88-05 throughout the state-court proceedings, trial and appellate. The state courts rebuffed his attacks, and affirmed his convictions.

Later in March 1988, he filed in the federal district court, the first of two (later) consolidated cases, both brought as civil rights claims under 42 U.S.C. § 1983.[1] Respondent sought injunctive, declaratory, and monetary relief. He mounted the same attacks on the constitutionality of the temporary licensing ordinance, 88-05, and its permanent successor, 88-06.[2]

This case is his federal habeas corpus case, which he brought in May 1991, when he was finally ordered to begin serving a 60-day sentence for his three convictions of violating the ordinance. After denying an emergency motion to stay sentence, the district court referred his petition for writ of habeas corpus to a magistrate judge, pursuant to 28 U.S.C. § 636 (b)(1)(C) and Rule 8(b) of the Federal Rules Governing § 2254 Proceedings.

On March 4, 1992, the magistrate judge issued a report and

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1. The second § 1983 case involved challenges to the Citrus County zoning ordinance, 88-A51, which established restrictions for the location of adult entertainment establishments in the county. In that case, Respondent Redner, as Plaintiff, sought injunctive and declaratory relief only. The district court reached the merits of his attacks on the zoning ordinance, 88-A51, upholding it as constitutional; and the court of appeals' affirmance, *Redner v. Citrus County, Fla.*, 919 F.2d 646, 648 n.4 (11th Cir. 1990), left the district court's decision final.

2. The district court abstained under *Younger v. Harris* from deciding the merits of the attacks on both of the licensing ordinances. The court of appeals affirmed the abstention concerning the temporary licensing ordinance, 88-05, but reversed the abstention as to all of 88-06, remanding for consideration Respondents' same claims on that ordinance. That case (No. 88-50-CIV-OC-10) is pending — but stayed — before the district court, waiting if this ordinance remains overturned as unconstitutional.

recommendation, opining that ordinance 88-05 is unconstitutional, and recommending that the petition for writ of habeas corpus be granted. The district court adopted and confirmed the magistrate judge's report and recommendation, and entered a final judgment on May 18, 1992, granting the petition for writ of habeas corpus. Petitioner Dean and Respondent, the Florida attorney general, were directed to take the necessary steps to set aside Respondent's convictions and to discharge him from any restraint.

On October 13, 1992, Petitioner Dean timely appealed the district court's amended final judgment.[3] On August 26, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's ruling. A petition for rehearing and suggestion of rehearing *en banc* were denied on November 2, 1994. On November 15, 1994 the court of appeals issued its mandate.

Petitioner Dean now petitions this Court, pursuant to 28 U.S.C. § 1254(a), for a writ of certiorari to review the decisions of the court of appeals.

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3. On May 28, 1992, the Florida attorney general (one of the two respondents in the district court below), moved under Fed. R. Civ. P. 59(e), to amend the civil judgment to provide that the responsibility of setting aside Respondent Redner's convictions and the assessment of costs should be imposed solely on Petitioner Dean, not on the Florida attorney general. On September 15, 1992, the district court granted the Florida attorney general's motion, and entered an amended judgment, which also relieved the Florida attorney general from responsibility for costs and of setting aside Respondent Redner's judgments of conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS SHOULD HAVE APPLIED THE FOURFOLD TEST OF *UNITED STATES V. O'BRIEN*,[4] (APPROVED IN *BARNES V. GLEN THEATRE, INC.*[5]), TO ASSESS THE CONSTITUTIONALITY OF THE CITRUS COUNTY LICENSING ORDINANCE, WHICH PROHIBITS SPECIFIED SEXUAL ACTIVITIES AND REGULATES THE DISPLAY OF NUDITY IN ANY BUSINESS ESTABLISHMENT, RATHER THAN THE TWO-STEP, PRIOR RESTRAINT TEST SET FORTH IN *FW/PBS, INC. V. CITY OF DALLAS*.[6]

A. *Barnes v. Glen Theatre, Inc.* is similar to the case at hand.

In *Barnes v. Glen Theatre, Inc., supra*, a plurality of the Court upheld the enforcement of an Indiana public indecency law prohibiting "totally nude dancing." *Id.* at __, 111 S. Ct. at 2458. Indiana "ha[d] not banned nude dancing as such, but ha[d] proscribed public nudity across the board." *Id.* at __, 111 S. Ct. at 2460. The statute precluded nudity in public places, and prevented this type of nude dancing as well as other forms of public nudity, by requiring the dancers to wear "pasties and a G-string." *Id.* at 2457 & 2460.

"[T]he enforcement of Indiana's public indecency law to prevent totally nude dancing does not violate the First

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4. 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

5. 501 U.S. __, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991). *Barnes* was a plurality decision (Rehnquist, C.J., O'Connor, & Kennedy, JJ.) in which Scalia and Souter, JJ., joined with separate, concurring opinions.

6. 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 215 (1990).

Amendment's guarantee of freedom of expression." *Id.* at 2457. "[T]he Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and a G-string does not violate the First Amendment." *Id.* at __, 111 S. Ct. at 2460.

Supported by some of this Court's earlier decisions,[7] *Barnes* declared that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.* The two important issues to be determined were (1) "the level of protection to be afforded to the expressive conduct at issue, and . . . [(2)] whether the Indiana statute is an impermissible infringement of that protected activity." *Id.* To evaluate the constitutionality of the statute, the Court applied the four-part test from *United States v. O'Brien.*[8]

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7. *See California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981).

8. In *United States v. O'Brien*, the Court scrutinized a law that prohibited destruction of selective service "draft cards" and allegedly infringed on constitutionally protected "symbolic speech." The Court recognized that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 377, 88 S. Ct. at 1678-79.

To determine whether the government interest was sufficient to justify incidental limitations on First Amendment freedoms, the Court applied the following four-pronged test: the regulation in question (1) is within the constitutional power of the government; (2) furthers an important or substantial government interest; (3) is unrelated to the suppression of free expression; and (4) is an incidental restriction on alleged First Amendment freedoms, no greater than is essential to the furtherance of that interest. *Id.* at 377, 88 S. Ct. at 1679.

> I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the four-part enquiry described in *United States v. O'Brien,* [*supra,*] for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation.

Id. at __, 111 S. Ct. at 2468 (Souter, J., concurring).

The court held that "the public indecency statute furthers a substantial governmental interest in protecting order and morality," an interest "unrelated to the suppression of free expression." *Id.* at __, 111 S. Ct. at 2462.[9] It rejected the contention that "prohibiting the performance of nude dancing is related to expression because the state seeks to prevent its erotic message." *Id.*

> [T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic

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9. The "standard for judging the validity of restrictions on expressive conduct," under the fourfold *United States v. O'Brien* test, " 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.' " *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S. Ct. 2746, 2757, 105 L. Ed. 2d 661 (1989), quoting *Clark v. Community for Creative Nonviolence,* 468 U.S. 288, 298 & n.8, 104 S. Ct. 3065, 3071 & n.8, 82 L. Ed. 2d 221 (1984).

> message, yet the state still seeks to prevent it. Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity. . . . So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

Id. at __, 111 S. Ct. at 2463.

The thrust of the decision is that, although certain activities exhibiting public nudity may include some expressive component lying marginally "within the outer perimeters of the First Amendment," *id.* at __, 111 S. Ct. at 2460; the regulation — or prohibition (as in *Barnes*) — of the nudity itself is the regulation of non-expressive conduct,[10] even if it is combined with some form of expression. Legislation regulating this non-expressive conduct is evaluated under the fourfold criteria of *United States v. O'Brien*, even though it also may affect, secondarily, some expression as well.

In the case at hand, Citrus County's adult-entertainment licensing ordinance allows dancing establishments to present a variety of forms of dancing entertainment "for commercial or pecuniary gain," without the necessity of a license. It is the display of specified anatomical areas, in the course of operating a commercial establishment — and not the dancing ("regardless of whether the employee actually engages in dancing") — that triggers the ordinance's requirement of a license to operate. Certain, specific, non-expressive conduct (the exposure of

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10. Justice Scalia, concurring, noted that Indiana was "regulating conduct, not expression, and those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden." *Id.* at __, 111 S. Ct. at 2468.

"specified anatomical areas") is regulated, and only that conduct invokes the necessity for a license.

The ordinance also prohibits some conduct (specified sexual activities), while merely restricting the manner and place of other conduct (displaying or exposing specified anatomical areas). It is a limitation and condition on various forms of public nudity, but it does not affect the expressive act of dancing.

If a state can prohibit all forms of public nudity, including "totally nude dancing as entertainment"[11] (as in *Barnes*), without transgressing the First Amendment, it can surely regulate that conduct by requiring a license for establishments where that conduct will occur. Ordinance 88-05, which conditions conduct (nudity) on the obtaining of a license, regardless of whether the applicant actually will engage in expressive speech, can scarcely be deemed a prior restraint of constitutionally protected expression.

First Amendment protection, albeit meager, may exist for a combination of nudity and dance. However, it is the dancing (expression) that qualifies for protection, not the nudity (conduct). That is evident from this Court's decision in *Barnes*, upholding the complete prohibition of public nudity, regardless of whether it occurred with dancing, or in conjunction with some other activity or setting. 501 U.S. at __, 111 S. Ct. at 2463.

A majority of the Court, since the decision in *Barnes*, has relied on it in noting the longstanding rule,

> [T]hat nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses — so that

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11. *Barnes v. Glen Theatre, Inc.*, 501 U.S. at __, 111 S. Ct. at 2458.

> burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

R.A.V. v City of St. Paul, Minn., 505 U.S. __, __, 112 S. Ct. 2538, 2544, 120 L. Ed. 2d 305 (1992).

B. Citrus County Ordinance 88-05 satisfies the *O'Brien* test.

Judged under the fourfold test of *United States v. O'Brien*, Citrus County's adult-entertainment, licensing ordinance, 88-05, easily passes constitutional muster.

1. *The regulation is within the constitutional power of Citrus County.*

In *Barnes v. Glen Theatre, Inc.*, "[t]he public indecency statute," enacted to prohibit all public nudity, was "clearly within the constitutional power of the State." *Id.* at __, 111 S. Ct. at 2461. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and [the Court] ha[s] upheld such a basis for legislation." *Id.* at __, 111 S. Ct. at 2462.

Ordinance 88-05 is a legitimate exercise of Citrus County's police power. The ordinance describes the authority and purpose of its enactment: "to establish reasonable and uniform regulations that will protect the health, safety, morals, and general welfare of the people of Citrus County." (§§ 1-2, 1-5, App. H, at 41a-42a).

2. *The ordinance furthers an important and substantial governmental interest.*

In *Barnes*, "the public indecency statute further[ed] a substantial government interest in protecting order and

morality." 501 U.S. at __, 111 S. Ct. at 2462. "The asserted state interest is plainly a substantial one," and prohibiting nude dancing "furthers" that interest. *Id.* at __, 111 S. Ct. at 2469 (Souter, J. concurring).

> [T]he interest asserted ... in preventing prostitution, sexual assault, and other criminal activity, although presumably not a justification for all applications of the statute, is sufficient under [*United States v.*] *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment at issue here.

Id. at __ , 111 S. Ct. at 2470. Live nude dancing is likely to produce pernicious secondary effects, as did the films in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). *Id.* "The State of Indiana could reasonably conclude that forbidding nude entertainment ... furthers its interest in preventing prostitution, sexual assault, and associated crimes." *Id.*

Citrus County's objective — to protect the health, safety, and general welfare of its people by targeting, and attempting to reduce, the adverse, secondary effects of adult entertainment establishments — is an important and substantial governmental interest; and it satisfies *O'Brien's* second prong. In the Findings of Fact of ordinance 88-05, Citrus County chronicled the various sources of evidence for the adverse secondary effects of adult uses on the community that were considered in enacting the ordinance. In addition to listing the studies and evidence upon which the county based its findings, the ordinance contains a detailed description of the type of unhealthy, unsafe, and illegal activities its licensing requirement is designed to minimize (§ 1-6(c)-(q), App. H, at 43a-46a).

3. *The governmental interest is unrelated to suppression of free expression.*

"[T]he governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression." *Barnes v. Glen Theatre, Inc.*, 501 U.S. at __, 111 S. Ct. at 2470 (Souter, J., concurring). The state seeks to prevent public nudity, an "interest [that] is unrelated to the suppression of free expression." *Id.* at __, 111 S. Ct. at 2462-63. Prohibiting public nudity "is regulating conduct, not expression." *Id.* at __, 111 S. Ct. at 2468 (Scalia, J., concurring).

Citrus County's interest in minimizing the adverse secondary effects associated with adult entertainment establishments is unrelated to the suppression of free speech and, therefore, satisfies *O'Brien's* third condition. Like the total ban on public nudity in *Barnes;* and like the zoning ordinance in *Renton*; ordinance 88-05 is directed at the reduction and prevention of the adverse, secondary effects of the adult establishments in the surrounding community, not at any constitutionally protected expressive conduct. This is evident from the ordinance's stated purpose, Findings of Facts, and the licensing provisions themselves. (§§ 1-5; 1-6; 2-4(a) & (b); 2-5(c), App. H., at 42a, 60a-63a).

4. *The incidental restriction on First Amendment freedom is no greater than is essential to the furtherance of the governmental interest.*

> [T]he governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and amongst strangers. The statutory prohibition is not a means to some greater end, but an end in itself. It is without cavil that the public

> indecency statute is "narrowly tailored;" Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bar minimum necessary to achieve the state's purpose.

Id. at __, 111 S. Ct. at 2463. Indiana's statute effectively prohibited all nude dancing; yet it met the fourth prong of *O'Brien* as being only an incidental restriction in furtherance of the state's legitimate interests. The parties had acknowledged in *Barnes* that licensing or zoning requirements imposed on adult entertainment businesses have a vastly less restrictive effect on any expressive conduct than does a complete ban on the particular activity.

Ordinance 88-05 does not prohibit nude dancing or the operation of adult entertainment establishments; it merely requires the licensing of each such establishment — which by definition is one where nudity is depicted — as a condition of its operation. Once an application is properly filed and the establishment is in compliance with all applicable health, safety, and zoning requirements, the County Administrator must grant the license.

The licensing requirement is simply an intermediate, regulatory step which adult entertainment businesses must take, to ensure that the public health, safety, and general welfare is protected. It is an incidental restriction, at most, on any First Amendment freedoms of applicants-operators; and it is no greater than is necessary to further the County's interest in minimizing the adverse, secondary effects of adult entertainment establishments.

Citrus County adult-entertainment, licensing ordinance, 88-05, is a far less restrictive impingement than a total ban on nudity-

while-dancing, an interest of marginal First Amendment magnitude at best. Tested against the four-part standard of *United States v. O'Brien,* the ordinance satisfies each of the requirements.

II. THE COURTS OF APPEALS' ERROR IN THE PRESENT CASE EXHIBITS THE DISCORD AND CONFUSION AMONGST THE LOWER COURTS IN USING THE TWO DIFFERENT TESTS IN *BARNES V. GLEN THEATRE, INC. AND FW/PBS, INC. V. CITY OF DALLAS,* TO JUDGE THE CONSTITUTIONALITY OF LAWS REGULATING ESTABLISHMENTS DISPLAYING NUDITY, FOR WHICH THIS COURT MUST PROVIDE GUIDANCE TO RESOLVE THE CONFLICT AND ESTABLISH UNIFORMITY.

As previously discussed, the *O'Brien* test, employed in *Barnes,* is used to determine the constitutionality of laws aimed at governing conduct (in this case, nudity), which may or may not have an effect on expression or speech. However, some circuit courts of appeals have chosen to apply the two-step test in *FW/PBS,*[12] to determine the constitutionality of laws that regulate this type of conduct.

The courts of appeals are in conflict amongst themselves, about the correct test — *O'Brien* or *FW/PBS* — to use to determine the constitutionality of laws regulating adult

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12. The plurality opinion in *FW/PBS, Inc. v. City of Dallas,* endorsed a two-step test to determine if an ordinance regulating adult entertainment establishments provided adequate procedural safeguards (as required by *Freedman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965)): (1) "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained"; and (2) "there must be the possibility of prompt judicial review in the event the license is erroneously denied." 493 U.S. at 229, 110 S. Ct. at 606.

entertainment establishments displaying nudity. Some courts of appeals have chosen to apply the *O'Brien* test (pursuant to this Court's opinion in *Barnes*), while others have applied the *FW/PBS* test. At times, courts have applied one test or the other (or both) because of the type of ordinance in question (*i.e.* zoning, licensing, or prohibition of all public nudity).[13]

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13. The mere type of ordinance regulating adult entertainment activity — zoning or licensing — cannot provide a basis for applying either the *O'Brien/Renton* analysis, or the *FW/PBS* test. Throughout his attacks on Citrus County ordinances, Respondent Redner has acknowledged that it makes no difference whether an ordinance is a zoning ordinance or a licensing ordinance, for purposes of evaluating its constitutionality. The disagreement has always been over which test applies, and whether the ordinance in question satisfies that test.

In fact, the common thread in the lower courts' pervasive confusion, concerning which analysis to use — *i.e.*, how — to evaluate the constitutionality of such legislation, — and which implores a clarifying decision from this Court, — exists regardless of whether the particular legislation under scrutiny is zoning, licensing/permitting, or both. *Redner v. Dean*, 29 F.3d 1495, 1497-99 (11th Cir. 1994) (licensing ordinance evaluated under *FW/PBS* test); *Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068 (5th Cir. 1994) (code's zoning conditions analyzed under *O'Brien/Renton* test, but licensing conditions under *FW/PBS* test); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir.) (zoning ordinance analyzed under *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 578 (1994); *TK's Video, Inc. v. Renton County, Tex.*, 24 F.3d 705, 707 (5th Cir. 1994) (licensing ordinance analyzed under both *O'Brien/Renton* and *FW/PBS* tests); *Ambassador Books & Video, Inc. v. Little Rock, Ark.*, 20 F.3d 858, 863 (8th Cir.) (zoning ordinance evaluated by *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 186 (1994); *Holmberg v. City of Ramsey*, 12 F.3d 140, 142 (8th Cir. 1993) (zoning ordinance analyzed under *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 59 (1994); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 128, 130 n. 7 (3d Cir. 1993) (licensing ordinance evaluated under *O'Brien* test); *Cafe 207, Inc. v. St. John's County*, 989 F.2d 1136 (11th Cir. 1993) (ordinance prohibiting public nudity examined under *O'Brien* test); *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1255, 1257-60 (5th Cir.

(Cont'd)

This confusion is extensive, rampant, and recurrent. It is evident from the fact that several circuits have applied one test, only to switch to the other test (without overruling, or explaining previous opinions), or to apply both tests in the same case. Continued lack of guidance on this issue will lead without question to further conflict and inconsistencies. As evidenced by abundant, recent case law, this is a "live" and repeated problem, needing direction from this Court.

A. Review of the courts of appeals' decisions reveals conflict and inconsistency.

1. *Third Circuit Court of Appeals*

The most recent pronouncement by the Third Circuit, concerning the regulation of adult entertainment facilities, is in *Mitchell v Commission on Adult Entertainment Establishments, supra.* The case involved amendments to an adult entertainment licensing statute enacted by the Delaware General Assembly.

> The Act defined the "Adult Entertainment Establishments"[14] subject to the Act, imposed

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(Cont'd)
1992) (zoning-permitting ordinance analyzed under *O'Brien/Renton* test), *cert. denied,* __ U.S. __, 113 S. Ct. 1845, 123 L. Ed. 2d 469 (1993); *DG Restaurant Corp. v. City of Myrtle Beach,* 953 F.2d 140, 143 (4th Cir. 1992) (ordinance prohibiting public nudity evaluated under *O'Brien* test); *International Eateries of Amer., Inc. v. Broward Cty, Fla.,* 941 F.2d 1157, 1158-59 (11th Cir. 1991) (zoning ordinance evaluated under *Renton* test), *cert. denied,* __ U.S. __, 112 S. Ct. 1294, 117 L. Ed. 2d 517 (1992).

Both licensing and zoning ordinances address conduct — nudity — by their different requirements (set backs, licenses, permits), and any determinative standard of constitutionality should apply to both alike.

14. "The Act define[d] 'Adult Entertainment Establishment' as: 'Any commercial establishment, business or service, or portion thereof, which
(Cont'd)

> a requirement that persons who engaged in the operation of such establishments first obtain a license and comply with certain other provisions, and established the Commission on Adult Entertainment Establishments to oversee compliance. The Act also provided criminal penalties for those who operate an adult entertainment establishment without a license or in contravention of the requirements of the Act.

Id. at 128. Although the district court had upheld the constitutionality of the statute under *Renton;* it invalidated the adult entertainment commissions' inaction for more than three years on the plaintiff's application for a new license (after an earlier revocation of a previous license), based on the *FW/PBS,* two-procedural-steps test.[15] On appeal "the parties [had] concede[d] *Renton's* applicability," and the court of appeals analyzed the statute's constitutionality under the *Renton,* time, place, and manner test. 10 F.3d at 30 n.7.

> [I]f the regulation's predominate purpose is the amelioration of socially adverse secondary effects of speech-related activity, the regulation is content-neutral and the court must measure it against the traditional content-neutral time, place, and manner standard.

(Cont'd)
offers sexually oriented material, devices, paraphernalia or specific sexual activities, services, performances, or any combination thereof, or in any other form, whether printed, filmed, recorded or live.' Del. Code. Ann tit. 24, 1602(2) (Supp. 1992)."

15. 764 F. Supp. 928, 938-39 (D. Del. 1991).

Id. at 130. At the same time, the court acknowledged that "in *Barnes,* the Supreme Court indicated that the applicable analysis for evaluating restrictions on nude dancing is the analysis formulated in *United States v. O'Brien,*" *Id.* n. 7.[16]

2. *Fourth Circuit Court of Appeals*

The Fourth Circuit has confusingly applied two different tests, in two separate cases, to determine the constitutionality of adult entertainment ordinances. In *DG Restaurant Corp. v. City of Myrtle Beach, supra,* the plaintiff, DG Restaurant, planned and obtained permits to open a night club offering topless dancing. 953 F.2d at 142. In reaction, the city council passed a zoning ordinance regulating the location of any business which permitted nudity. *Id.* When DG Restaurant applied for a business license, it was denied because "the proposed use would violate [the zoning ordinance]." *Id.* at 142-43. DG Restaurant challenged the constitutionality of the ordinance claiming it was directly aimed at topless dancing, "an expressive and communicative activity protected by the free-speech clause of the First Amendment." *Id.* at 143.

After a trial, the district court ruled that "the timing of the enactment of [the zoning ordinance] combined with the ultimate effect of the ban on public displays of nudity, created a strong inference that [the city's] primary concern was 'to restrict the message purveyed by topless dancing.' " *Id.* The court stated that the ordinance was content-based, and "[as] such, it presumptively violate[d] the First Amendment." *Id.*

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16. The court noted that, in adopting the *O'Brien* analysis in *Barnes,* "the Supreme Court indicated that it parallels the analysis applied in *Renton* [*supra*]"; and that courts considering the constitutionality of adult entertainment ordinances "have applied both *O'Brien* and *Renton,* indicating that the outcome is the same regardless of which analytical framework is applied." *Id. See supra* note 9.

The court of appeals set forth a comprehensive analysis of the principles enunciated in *Barnes*, and used the *O'Brien* test. The court noted that although the First Amendment occasionally extends beyond the spoken (or written) word to conduct, "the courts have not applied the same First Amendment protections to physical conduct as is afforded to purer modes of communicative speech." *Id.*

> Although conduct may contain inherent expressive elements or may be undertaken for a particular communicative purpose, an important governmental interest in regulating the activity itself, without regard to the expressive element, to justify a necessary incidental restriction on the expressive aspect of the conduct. See *United States v. O'Brien*, 391 U.S. [at] 376-77, 88 S. Ct. [at] 378-79. The Constitution does not require that otherwise unacceptable conduct become immunized from regulation when it is wrapped in a claim that the conduct was intended to convey a message.

Id. "The mere existence of a potential for expression through conduct simply does not result in a wholesale immunization of what would otherwise be a legitimately regulated activity." *Id.* at 144.

The fourfold test of *United States v. O'Brien* resolves the constant tension between regulating unacceptable conduct and protecting speech. *Id.* at 143. "In the end, the core analysis must resolve whether the governmental regulation of conduct is in fact the unconstitutional regulation of an intended message of the actor rather than a legitimate attempt to regulate physical conduct or some other important government purpose." *Id.* at 144.

More recently, the Fourth Circuit, with no discernable reasoning or justification, made a complete about-face, and applied the *FW/PBS* test to a zoning ordinance regulating adult entertainment businesses. *11126 Baltimore Blvd. v. Prince George's County, Md., supra.* The court neither acknowledged its previous precedent in *DG Restaurant,* nor that decision's use of the *O'Brien* test, based on the plurality decision in *Barnes.*

The plaintiff challenged a county zoning ordinance regulating the location of adult bookstores, contending that it was an unconstitutional restraint that failed to provide "adequate procedural safeguards." 32 F.3d at 111. In its initial review,[17] the Fourth Circuit had "conclud[ed] that the ordinance constituted a content-neutral time, place, and manner restriction which was narrowly tailored to serve the interest of Prince George's County in minimizing the secondary effects associated with, and protection of children from, adult bookstores and that it provided for ample other opportunities for speech." *Id.*

"Th[is] Court [then] granted [the plaintiff's] petition for writ of certiorari, vacated [the Fourth Circuit's] decision in [the case], and remanded for reconsideration in light of *FW/PBS.*" 32 F.3d at 112. After remand, and on review from a second decision by the district court, the Fourth Circuit analyzed the zoning ordinance's constitutionality under the two-step test advanced by the plurality in *FW/PBS,* instead of the time, place, and manner analysis of *Renton.* Use of the *FW/PBS* test, plainly inconsistent with that court's own, earlier analysis in *DG Restaurant* (when it also had the benefit of the plurality opinion in *FW/PBS*), illustrates the confusion, existing amongst and within the different circuits, concerning the application of the *O'Brien* and *FW/PBS* tests. Three months later, the entire Fourth Circuit granted rehearing *en banc*, vacated the opinion in *11126 Baltimore Blvd. v. Prince*

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17. 886 F.2d 1415, 1420, 1426 (4th Cir. 1989).

George's County, Md., and has scheduled reargument before the *en banc* court for March 7, 1995.

3. *Fifth Circuit Court of Appeals*

Lakeland Lounge v. City of Jackson, Miss., supra, presented an attack on the constitutionality of a zoning ordinance that restricted the plaintiff-establishment from operating in its current location. 973 F.2d at 1257. "In determining whether the amended ordinance was content-neutral, the district court followed the analysis laid out in *United States v. O'Brien*"; and the Fifth Circuit employed the *O'Brien/Renton* test to uphold the ordinance. *Id.* at 1257-58.

> The Jackson ordinance does not ban adult businesses outright, but merely limits the areas of the city in which they may operate. It is thus properly analyzed as a form of time, place, and manner regulation. . . . As such a regulation, it presumptively violates the First Amendment if it was "enacted for the purpose of retraining speech on the basis of its content," and it must be "designed to serve a substantial governmental interest" and may "not unreasonably limit alternative avenues of communication." [*City of Renton v. Playtime Theatres*], 475 U.S. at 47, 106 S. Ct. at 928. . . . Local governments, however, can restrict adult businesses in order to control the bad "secondary effects" — such as crime, deterioration of their retail trade, and a decrease in property values — that the establishments bring.

Id. at 1257.

The Fifth Circuit took a different approach to a licensing ordinance regulating adult businesses in *TK's Video, Inc. v. Denton County, Tex., supra.* An adult book and video store sued the county, "contending [that] its licensing requirements for 'adult' businesses violate[d] the First and Fourteenth Amendments." 24 F.3d at 707.

The Fifth Circuit held that erotic, nonobscene materials are protected by the First Amendment, "but enjoy less protection than some other forms of speech such as political speech." *Id.* The court "distinguish[ed] between regulating the content and regulating the consequence of protected activity," and evaluated the ordinance under the time, place, and manner test set forth in *Renton. Id.*

> A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative means of communication.

Id. The court ruled that "[t]he county's regulation did not on its face regulate content[,] [but was] aimed at the impact of the surrounding community." *Id.* The ordinance was constitutional as evaluated under the time, place, and manner test of *Renton.*

But then the court added: "there are also procedural limits to regulating even at this lesser level of protection," *id.*; and in an unusual and confusing twist, proceeded to evaluate the constitutionality of the ordinance again — this time under the *FW/PBS* test. *Id.* at 707-09. In effect, the court ruled that a licensing ordinance regulating adult businesses, is constitutional only if it passes both the time, place, and manner test of *Renton* (essentially the *O'Brien* test) *and* the *FW/PBS* procedural test.

The case of *Grand Brittain, Inc. v. City of Amarillo, Tex., supra,* further muddies the water. The court of appeals considered the constitutionality of the zoning chapter of the city code under the *O'Brien/Renton* time, place, and manner, but evaluated the licensing chapter of the code under the *FW/PBS* test. 27 F.3d at 1069-70. Apparently, the court of appeals distinguished between these two types of regulations as to which of the two different tests applies — a distinction not supported by either this Court's decisions, or previous decisions from the Fifth Circuit itself.

4. *Sixth Circuit Court of Appeals*

Triplette Grille, Inc. v. Akron, Oh., 40 F.3d 129 (6th Cir. 1994), "presented [the court] with the vexing task of divining which of the varied standards enunciated in *Barnes* is the law of the land," *id.* at 1233, in order to decide the constitutionality of a city ordinance that prohibited all public nudity.

> *Barnes* engendered four separate opinions, none of which commanded a majority of the Justices. . . . Justice Souter agreed with the Chief Justice that the Indiana statute was properly analyzed under the four-part *O'Brien* test, [but] he identified material harms, not moral concerns, as the basis for restricting First Amendment protection for expressive conduct.

Id. Under *Marks v. United States,* 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260 (1977), "the opinion of the Justice concurring in the judgment on the 'narrowest grounds' should be regarded as the Court's holding." 40 F.3d at 133.

> Applying the *Marks* rule, . . . Justice Souter's opinion resolved the question before the

> Supreme Court on the narrowest grounds[,] . . . set[ting] forth as its standard a coherent subset of the principles articulated in the plurality opinion. As a logical consequence of their approval of morality justifications for regulations of speech, Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy implicitly agreed with Justice Souter that governmental efforts to control the harmful secondary effects associated with adult entertainment can serve as a basis for restricting activities that enjoy First Amendment protection. . . . Because Justice Souter's opinion articulates a common underlying approach, it may be said to decide the question presented in *Barnes* on the "narrowest grounds."

Id. at 134. The Sixth Circuit then examined the ordinance under the *Renton/O'Brien* test. *Id.* at 135.

5. *Eighth Circuit Court of Appeals*

The Eighth Circuit has consistently employed the *Renton/O'Brien* test to examine the constitutionality of legislation regulating adult-entertainment businesses. In *Holmberg v. City of Ramsey, supra,* the city "amended [its] zoning ordinance to include provisions aimed at minimizing the unwanted secondary effects of sexually oriented businesses." 12 F.3d at 142. The ordinance created two commercial zones in which adults-only businesses could operate. *Id.* The owner and operator of an adults-only business challenged the zoning ordinance, *id.* at 141; and the court identified the *Renton* analysis as controlling the question of the ordinance's constitutionality. *Id.* at 142.

Because the city's zoning ordinance limits the

> location of sexually oriented businesses rather than banning them altogether, the ordinance is analyzed as a form of time, place, and manner regulation of protective speech. . . . Regulations of this kind withstand First Amendment attack provided the regulations are content-neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative avenues of communication.

Id. Under the *Renton* test, the court found the ordinance to be constitutional: (1) "justified without reference to the content of the regulated speech, is content-neutral"; (2) with the purpose to accomplish a substantial governmental interest, "to lessen the undesirable secondary effects sexually oriented businesses have on surrounding neighborhoods, mak[ing] those businesses less accessible to minors, prevent[ing] losses in property values, and reduc[ing] criminal activity," *id.* at143; while still (3) allowing reasonable, alternative opportunities to operate. *Id.* at 144.

"Following *Renton,*" the Eighth Circuit again analyzed the constitutionality of a zoning ordinance, in *Ambassador Books & Video, Inc. v. Little Rock, Ark.*, as a content-neutral, time, place, and manner regulation. 20 F.3d at 862. "The ordinance does not prohibit sexually oriented businesses from operating, but only limits the areas in which they may do so. As the district court and [the plaintiff] recognize[d], the ordinance is a typical time, place, and manner regulation — here place — and is content-neutral." *Id.* at 863. "[T]he ordinance is a content neutral time, place and manner regulation, [and] the 'appropriate inquiry in this case, then, is whether [it] is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.' " *Id.* at 864. The "amelioration of secondary effects" of adult establishments "is a substantial

government interest." *Id.* The court held that the "ordinance is designed to serve a substantial governmental interest and permits reasonable alternative avenues of communication." *Id.* at 865.

In *ILQ Investments, Inc. v. City of Rochester, supra,* the Eighth Circuit reversed a preliminary injunction against a zoning ordinance (regulating adult establishments), as "almost certain [to] survive constitutional challenge under *City of Renton.*" 25 F.3d at 1415. "Time, place, and manner regulations, are acceptable if they are 'content-neutral,' and if they are 'designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.' . . . Applying this test, we have recently upheld similar ordinances enacted by [other] cities."[18] *Id.* at 1416. " 'A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.' " *Id.*, quoting *Ward v. Rock Against Racism,* 491 U.S. at 791, 109 S. Ct. at 2754.

> Thus, even if a time, place, and manner ordinance regulates only businesses selling sexually explicitly materials, the ordinance is content-neutral if its purpose is to lessen undesirable secondary effects attributable to those businesses, such as increased crime, lower property values, or deteriorating residential neighborhoods. . . . Regulations reasonably designed to curb unwanted secondary effects of

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18. *E.g.*, "Little Rock, Arkansas, *see Ambassador Books & Video, Inc. v. City of Little Rock,* [*supra*]; Ramsey, Minnesota, *see Holmberg v. City of Ramsey,* [*supra*]; Minneapolis, Minnesota, *see Alexander v. City of Minneapolis,* 928 F.2d 278 (8th Cir. 1991); and St. Louis, Missouri, *see Thames Entertainment, Inc. v. City of St. Louis,* 851, F.2d 199 (8th Cir. 1988). *See also, SDJ, Inc. v. City of Houston,* 837 F.2d 1268 (5th Cir. 1988), *cert. denied,* 489 U.S. 1052, 109 S. Ct. 1310, 103 L. Ed. 2d 579 (1989)." *Id.*

> sexually oriented businesses serve a substantial governmental interest.

Id.

6. *Eleventh Circuit Court of Appeals*

The Eleventh Circuit has been equally confusing and inconsistent in using the *O'Brien* and the *FW/PBS* tests. In *International Eateries of Amer., Inc. v. Broward Cty, Fla., supra,* the court upheld the county's adult-entertainment zoning ordinance, against the plaintiff's challenge that it "[w]as violative of the First Amendment." 941 F.2d at 1158. The court stated that "[t]his term, the Supreme Court [in *Barnes*] squarely addressed the protection afforded to nude dancing under the First Amendment." *Id.* at 1159. After analyzing the opinions in *Barnes,* however, the court concluded that "it is still necessary after *Barnes* that the statute meet the secondary effects test of *Renton*" and so it should be guided by the *Renton* analysis, based on the concurring opinion of Justice Souter, and the kind of legislation involved.[19]

While the court of appeals noted "considerable confusion . . . as to when each analysis [*O'Brien* or *Renton*] should apply"; that confusion does not, ultimately, alter the outcome when applying either of those two tests. *Id.* at 1161 n.2.

> In recent years, however, the Court has stated several times that "in the last analysis [the O'Brien test] is little, if any, different from the standard applied to time, place, or manner

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19. The court of appeals believed that the adult-entertainment zoning statute in that case was different from the statute in *Barnes,* which "prohibited all public nudity, regardless of its expressive content." *Id.* at 1161. The court thought that the county's zoning legislation "single[d] out nude dancing rather than broadly prohibiting all public nudity." *Id.*

> restrictions." . . . [T]he Supreme Court has determined that under current Court doctrine the answer should be the same regardless of which analysis is used.

Id. But the confusion over the application of either the *O'Brien* or the *FW/PBS* tests — two different standards, with different objectives — often generates completely opposite results.

In *Cafe 207, Inc. v. St. John's County, supra,* the county, in direct response to the opening of a restaurant exhibiting nude female dancers, enacted an ordinance "that generally prohibit[ed] public nudity in unincorporated areas of the County." 989 F.2d at 1136. The ordinance required fully opaque coverings over certain parts and percentages of the body. *Id.*

The district court denied a preliminary injunction to *Cafe 207,* which had raised "First Amendment, vagueness, overbreadth and equal protection challenges to the ordinance," to prevent it being enforced. *Id.*

> The district court held that Cafe 207 does not have a substantial likelihood of prevailing on the merits in light of the Supreme Court's decision in *Barnes v. Glen Theatre, Inc.,* 501 U.S. ___, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (upholding an Indiana antinudity ordinance against a First Amendment challenge).

Id. at 1137. While expressly refraining from a decision on the merits, the Eleventh Circuit held that the district court's refusal of a preliminary injunction, relying on *Barnes v. Glen Theatre, Inc.,* was not an abuse of discretion. *Id.* When this case returned to the district court for a determination on the merits,[20] the court applied

20. 856 F. Supp. 644 (M.D. Florida 1994)

the *O'Brien* test set forth in *Barnes*, and granted the defendant's motion for summary judgment. 856 F. Supp. at 644 & 651.

In the instant habeas corpus appeal, from which this petition for writ of certiorari stems, *Redner v. Dean, supra,* Citrus County had adopted a licensing ordinance to regulate adult entertainment establishments. 29 F.3d at 1497. Respondent Redner refused to comply with the ordinance, opened his establishment without a license, and was "charged three times with violating the Ordinance by operating an adult-entertainment establishment without a license." *Id.* at 1498.

While the court of appeals looked to *Barnes* to conclude that "some minimal degree of First Amendment protection" was affected by "the conduct regulated by the Ordinance in the instant case," *id.* at 1499; the court ignored both the facts[21] and legal standard of *Barnes* in choosing to apply the two-step procedural test of *FW/PBS*, instead of the *O'Brien* analysis.

B. Only This Court can Resolve the Intolerable Confusion and Conflict.

The confusion regarding the application of these tests is not limited. Numerous lower federal courts have issued diverging, recent opinions concerning application of the *O'Brien* and/or *FW/PBS* tests. The discrepancies between the courts of appeals' use of these two tests, *O'Brien* and *FW/PBS*, in determining the constitutionality of adult-entertainment ordinances is not a mere inconsistency; it is an intolerable, recurrent conflict.

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21. The court of appeals incorrectly believed that "*Barnes* involved some incidental limitations on the conduct associated with the expressive activity, [but that] the instant case presents a complete restraint of protected expression. *Id.* Yet, three years earlier, it rightly recognized that the statute in *Barnes* was one that "prohibited all public nudity, regardless of its expressive content." *International Eateries of Amer., Inc. v. Broward Cty, Fla.*, 941 F.2d at 1161.

This Court has the power and responsibility to achieve uniformity of decisions amongst the courts, federal and state, on this question of federal constitutional law. Without a definitive decision resolving questions, confusion, and uncertainty concerning the application of the *O'Brien* and *FW/PBS* tests, this active area of constitutional law remains unsettled and confounding.

The confusion and inconsistency results in similar legislation being overturned or upheld, because of — and depending on — the different standards of constitutional analysis that are applied. It leaves governmental entities (state or local) without reliable direction or guidance when enacting legislation to regulate adult-entertainment establishments. It is a perilous task to attempt to draft effective, sound legislation, when its constitutionality is uncertain, for lack of an authoritative standard. A clear-cut opinion from this Court, concerning the appropriate application of these two standards of analysis, will enable governmental bodies to enact legislation that falls within the constitutional boundaries explained by this Court.

Without authoritative direction, governmental entities face the risks of having duly enacted legislation overturned as unconstitutional, and of liability for enforcing such legislation. The inescapable result is more lawsuits against governmental entities, by operators of adult-entertainment establishments, for the enactment of allegedly unconstitutional legislation, burdening the already overloaded time and resources of the judicial system.

The threat of legal assault discourages, and jeopardizes, governmental entities' enacting such legislation, to secure the important, basic goals — the health, safety, peace, and general welfare of their citizens — for which governments are established.

Future, lower court decisions are unlikely to resolve this confusing conflict. All of the varying decisions surveyed in this petition have had the benefit of the plurality opinions in both *Barnes* and *FW/PBS*. Lack of direction from this Court promises grave future consequences. Simply allowing the unmistakable tension between those two plurality decision of this Court will not foster homogeneous decisions amongst the circuits. It only leaves the stage set for persisting inconsistency by the lower courts, in the application of these two different tests, to decide challenges to the constitutionality of legislation regulating adult-entertainment activity.

It is imperative, not just for the parties to this action; but for the lower federal courts and the courts of the states; for legislative governments, at state and local levels; and for potential and future litigants, to understand the correct standard and analysis — either the *O'Brien* or *FW/PBS* test — that governs, and when it will apply, to determine the constitutionality of legislation regulating adult-entertainment establishments and activities.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit: to review, correct, and clarify the error in its decision, resulting from the divergent confusion over this area of federal constitutional law.

Respectfully submitted,

RUSSELL W. LaPEER
Counsel of Record
ROBERT R. WHEELER
LANDT, WIECHENS, TROW & LaPEER
Attorneys for Petitioner

APPENDIX A — MANDATE OF UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT FILED NOVEMBER 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-3033

D.C. Docket No. 91-90-CIV-Oc-10

JOSEPH RICHARD REDNER,

Petitioner-Appellee,

versus

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Respondent-Appellant,

ROBERT A. BUTTERWORTH,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON and BIRCH, Circuit Judges, and ALBRITTON*, District Judge.

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* Honorable W. Harold Albritton, III, U.S. District Judge for the Middle District of Alabama, sitting by designation.

Appendix A

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: August 26, 1994
For the Court: Miguel J. Cortez, Clerk

By s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: NOV 15 1994

APPENDIX B — OPINION OF UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT DATED AUGUST 26, 1994

Joseph Richard REDNER,

Petitioner-Appellee,

v.

Charles S. DEAN, Sheriff of Citrus County, Florida,

Respondent-Appellant,

Robert A. Butterworth,

Respondent-Appellee.

No. 92-3033.

United States Court of Appeals,

Eleventh Circuit.

Aug. 26, 1994.

* * *

Russell W. LaPeer, Robert R. Wheeler, Landt, Trow, & LaPeer, Ocala, FL, for appellant.

Luke Charles Lirot, Clearwater, FL, for appellee Redner; Belle B. Turner, Asst. Atty. Gen., Daytona Beach, FL, for appellee Butterworth.

Appeal from the United States District Court for the Middle District of Florida.

Appendix B

Before ANDERSON and BIRCH, Circuit Judges, and ALBRITTON*, District Judge.

BIRCH, Circuit Judge:

In this habeas corpus appeal, we must decide the constitutionality of a Citrus County, Florida licensing ordinance (the "Ordinance") regulating adult entertainment establishments. The district court found the Ordinance facially unconstitutional because it lacked the procedural safeguards required for a system of prior restraint. The court therefore granted the writ of habeas corpus to the petitioner, who had been convicted of violating the Ordinance. The district court also granted the motion of the Florida Attorney General, releasing him from costs and from the responsibility for setting aside the petitioner's conviction. We affirm both of the district court's rulings.

I. BACKGROUND

In March 1988, the petitioner-appellee, Joseph Redner, began preparations to open an adult entertainment facility in Citrus County, Florida. Redner planned to open the facility on March 25, and by March 24, he had acquired all necessary permits and licenses. At the time, Citrus County had no ordinance specifically governing adult entertainment facilities. On March 25, however, the Citrus County Board of County Commissioners (the "Board") held an emergency session and adopted temporary Citrus County Ordinance No. 88-05, entitled the "Citrus County Adult Entertainment Ordinance."[1]

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* Honorable W. Harold Albritton, III, U.S. District Judge for the Middle District of Alabama, sitting by designation.

1. A copy of the Ordinance is attached as an APPENDIX, *infra*.

Appendix B

The stated purpose of the Ordinance is "to establish reasonable and uniform regulations that will protect the health, safety, morals and general welfare of the people of Citrus County, Florida." Citrus County Ordinance No. 88-05, § 1-5. The Ordinance attempts to regulate adult entertainment establishments[2] within Citrus County by requiring operators of such facilities to obtain a license from the County Administrator (the "Administrator").[3] *Id.* § 2-2(a).

In order to obtain a license, an operator must submit to the Administrator an application containing, among other things, the applicant's name, business designation, and criminal history; whether the applicant has had a previous license revoked or suspended; whether the applicant has any other licenses; and other information about the facility, including location, site plan, and a list of employees. *Id.* § 2-3(b). The Administrator must then send copies of the application to the Sheriff, the Department of Development Services, Fire Prevention, and the Health

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2. The Ordinance defines "Adult Entertainment Establishment" as "an adult bookstore, or an adult dancing establishment operated for commercial or pecuniary gain." Citrus County Ordinance No. 88-05, § 1A-7(d). An "Adult Bookstore" is defined as "an establishment which sells or rents adult material," unless such material is accessible only to employees and constitutes a small, specified percentage of the facility's business. *Id.* § 1A-7(a). An "Adult Dancing Establishment" is defined as "an establishment where employees display or expose specified anatomical areas to others, regardless of whether the employees actually engage in dancing." *Id.* § 1A-7(c). The Ordinance goes on to define "Adult Material," "Specified anatomical areas," and other relevant terminology. *See id.* § 1A-7.

3. The Ordinance also requires individual employees to obtain permits. *Id.* § 3-1(a).

Department, whereupon each agency conducts an investigation. *Id.* § 2-4(a). If any of these investigations reveals that the proposed establishment will be in violation of any building, fire, health, or zoning statute, code, ordinance, or regulation, the agency must notify the Administrator. *Id.* § 2-4(b).

Section 2-5(c) provides the reasons for which the Administrator may deny a license.[4] The Administrator must make its decision to grant or deny a license within forty-five days of the filing of the application.[5] *Id.* § 2-5(a)(1). At the expiration of the forty-five-day time period, "the applicant may be permitted to begin operating the establishment for which a license is sought, unless and until the County Administrator notifies the applicant

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4. Section 2-5(c)(1) provides that the Administrator shall deny an application for any of the following reasons:

> (A) any of the Departments, excluding the Sheriff, has disapproved of the application;
>
> (B) the application contains material false information;
>
> (C) the applicant or any of the other individuals listed . . .has a license under this Ordinance which has been suspended or revoked;
>
> (D) the granting of the application would violate a statute or ordinance or an order from a court of law which effectively prohibits the applicant from obtaining an adult entertainment establishment license.

Id. § 2-5(c)(1).

5. The time limit is 14 days for adult bookstores. *Id.* § 2-5(a)(2).

of a denial of the application and states the reason(s) for the denial." *Id.*

An applicant who is denied a license has fifteen days to appeal to the Board. *Id.* § 6-1(1). Upon receipt of the notice of appeal, the Clerk of the Board "shall schedule a hearing for as soon as the Board's calendar will allow." *Id.* § 6-1(2). "If, at the conclusion of the hearing, the Board finds that the license or permit should not have been denied . . ., it shall so notify the County Administrator, who shall immediately grant . . . the license. . . ." *Id.* § 6-1(3).[6]

In the present case, Redner refused to comply with the Ordinance and opened his adult entertainment establishment without applying to the Administrator for a license. Within four days, Redner had been charged three times with violating the Ordinance by operating an adult entertainment establishment without a license. Seeking declaratory, injunctive, and compensatory remedies, Redner immediately brought an action under 42 U.S.C. § 1983 in the United States District Court for the Middle District of Florida challenging the constitutionality of the Ordinance.

Before the federal case went to trial, however, Redner was

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6. The Ordinance contains other provisions regulating the operation of adult entertainment establishments. Section 4 of the Ordinance contains general provisions for adult entertainment establishments, including regulations concerning the structure and design of adult dancing facilities. *Id.* § 4. Section 5 imposes criminal penalties for operating without licenses, allowing employees to engage in certain prohibited acts, allowing minors on the premises, and other violations of the Ordinance. *Id.* § 5.

tried in state court for Citrus County, where he defended on the grounds that the Ordinance was unconstitutional. The court upheld the Ordinance and Redner was convicted on three counts of operating an adult entertainment establishment without a license. Redner's conviction was affirmed by the Florida Fifth Judicial Circuit Court, and the Florida Fifth District Court of Appeal denied discretionary review.

In February 1989, Redner's federal civil rights case went to trial in the Middle District of Florida. Refusing to interfere with the ongoing state criminal proceedings, the district court abstained from ruling on the constitutionality of the Ordinance. We affirmed the district court's abstention, but remanded the case for further proceedings concerning Redner's identical attacks on the constitutionality of the successor, permanent licensing ordinance, *Redner v. Citrus County,* 919 F.2d 646 (11th Cir. 1990), *cert. denied,* __ U.S. __, 112 S.Ct. 303, 116 L.Ed.2d 246, *and cert. denied,* __ U.S. __, 112 S.Ct. 303, 116 L.Ed.2d 246 (1991). That case is being held in abeyance in the district court pending the outcome of this appeal.

In May 1991, Redner was to begin serving the sentences for his state criminal convictions. He filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court referred the petition to a magistrate judge, and on March 4, 1992, the magistrate judge issued a report and recommendation finding the Ordinance unconstitutional. The magistrate judge found that the Ordinance fails to provide the procedural safeguards necessary for a system of prior restraint because it does not place specific time limits on the decision-maker and does not provide for prompt judicial review. The district court adopted the magistrate judge's report and recommendation and granted Redner's petition for habeas corpus relief. The court directed the two

respondents, Florida Attorney General Robert Butterworth and Citrus County Sheriff Charles Dean, to set aside Redner's convictions and discharge him from any restraint. The court also directed Butterworth and Dean to pay Redner's costs.

On May 28, 1992, Butterworth made a motion under Federal Rule of Procedure 59(e) to amend the civil judgment to place the responsibility for costs and for setting aside the conviction on Dean alone. The district court granted this motion. Dean timely appealed both the grant of the habeas petition and the decision to amend the judgment.[7] Redner and Butterworth are the appellees.

II. DISCUSSION

A. Constitutionality Of The Ordinance

Dean challenges the district court's grant of Redner's motion for habeas corpus relief. He argues that the Ordinance withstands constitutional scrutiny because it contains adequate procedural safeguards. The district court's ruling that the Ordinance is unconstitutional is a question of law, which we review *de novo*. *United States v. Osburn*, 955 F.2d 1500, 1503 (11th Cir.), *cert. denied*, __U.S. __, 113 S.Ct. 223, 121 L.Ed.2d 160, *and cert. denied*, __ U.S. __, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992).

At the outset, we reject Dean's argument that the activity regulated by the Ordinance is not protected by the First Amendment. We find it well settled that nude dancing is

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7. Redner filed a motion arguing that Dean did not properly perfect his appeal with respect to the constitutionality of the Ordinance. We agreed to carry this motion with the case. On February 23, 1994, we denied Redner's motion to strike. After oral argument, Redner filed a motion for reconsideration, which we denied on March 18, 1994.

expressive conduct entitled to some degree of First Amendment protection. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion), eight of the nine Justices on the Supreme Court found that non-obscene nude dancing is within the outer perimeter of the First Amendment, albeit minimally so.[8] When faced with a fragmented Court, we may distill the various opinions down to their narrowest grounds of concurrence to derive any binding precedent. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977); *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1159-61 (11th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). Based on *Barnes* and other Supreme Court precedent, we find it beyond dispute that the conduct regulated by the Ordinance in the instant case is entitled to some minimal degree of First Amendment protection.

While it enjoys some degree of First Amendment protection, however, nude dancing is not immune from governmental regulation. Even activity protected by the First Amendment can

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8. Chief Justice Rehnquist, in the plurality opinion joined by Justices O'Connor and Kennedy, stated that several Supreme Court cases indicate that nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2460. Justice Souter, in his concurrence, agreed with the plurality that "an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection." *Id.* at 581, 111 S.Ct. at 2468 (Souter, J., concurring in the judgment). The dissent, written by Justice White and joined by Justices Marshall, Blackmun, and Stevens, also agreed that nude dancing is expressive conduct within the parameters of the First Amendment. *Id.* at 587, 111 S.Ct. at 2471 (White, J., dissenting). Only Justice Scalia, in his concurrence, argued that the regulation of nude dancing "is not subject to First-Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. at 2463 (Scalia, J. concurring in the judgment).

be regulated if the regulation furthers a substantial government interest and constitutes only an incidental limitation on the expressive activity. *See United States v. O'Brien*, 391 U.S. 367-376, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968). In *Barnes*, for instance, the Supreme Court found that an Indiana statute requiring dancers to wear pasties and G-strings was not an impermissible infringement on the dancers' rights of freedom of expression. 501 U.S. at 567-68, 111 S.Ct. at 2461. The present case differs from *Barnes* in at least one important respect. While *Barnes* involved some incidental limitations on the conduct associated with the expressive activity, the instant case presents a complete restraint of protected expression.

The instant case is more analogous to another Supreme Court case, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). *FW/PBS* is the Supreme Court's most recent pronouncement on the prior restraint of nude dancing. Because it dealt with a licensing scheme similar to the Citrus County Ordinance, it provides us with valuable insight.

In *FW/PBS*, the Supreme Court entertained a facial challenge to a Dallas licensing ordinance regulating sexually oriented businesses. Like the Citrus County Ordinance the Dallas scheme regulated sexually oriented businesses with a system of zoning, licensing, and inspections. *FW/PBS* resulted in a plurality decision, with several concurrences and dissents; we must therefore attempt to find the narrowest ground of concurrence in the various opinions in order to derive the Court's holding. *See Marks*, 430 U.S. at 193, 97 S.Ct. at 993; *International Eateries*, 941 F.2d at 1159-61.

Justice O'Connor's plurality opinion, joined by Justices Stevens and Kennedy, analyzed the ordinance under *Freedman v.*

Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In *Freedman,* the Supreme Court held that any system of censorship that runs the risk of suppressing constitutionally protected expression must contain three procedural safeguards designed to obviate the dangers of censorship: (1) the burden of going to court to suppress the speech and the burden of proof once in court must lie with the censor; (2) any restraint prior to a judicial determination may only be for a specified brief time period in order to preserve the status quo; and (3) an avenue for prompt judicial review of the censor's decision must be available. *Id.* at 58-59, 85 S.Ct. at 739. In her plurality opinion in *FW/PBS,* Justice O'Connor found that the first of the *Freedman* procedural safeguards is not necessary in a licensing scheme regulating an entire business, as opposed to a scheme like that in *Freedman* involving the direct censorship of particular expressive material. *FW/PBS,* 493 U.S. at 229-30, 110 S.Ct. at 607. Justice O'Connor therefore found it unnecessary to place the burden of going to court on the censor and required only the second and third *Freedman* safeguards. Finding that these two procedural requirements were not met, Justice O'Connor held the Dallas ordinance unconstitutional.

Justice Brennan, joined by Justices Marshall and Blackmun, filed an opinion concurring in the judgment. Justice Brennan's concurrence differed with the plurality only in that the concurrence would have required all three of the *Freedman* procedural safeguards. *Id.* 493 U.S. at 238-39, 110 S.Ct. at 611 (Brennan, J., concurring in the judgment). Nevertheless, Justice Brennan agreed that the ordinance failed to meet these procedural requirements.

In *FW/PBS,* therefore, six Justices agreed that a licensing ordinance, such as the one in question here, must contain, at a

minimum, the latter two procedural safeguards from *Freedman:* specified brief time limits on the decisionmaker and prompt judicial review. We therefore scrutinize the Citrus County Ordinance to determine whether it meets these constitutional requirements.

1. Time Limits On The Decisionmaker

The first procedural safeguard required by *FW/PBS* is that the expressive activity may only be restrained prior to judicial review for a specified brief time period in order to maintain the status quo. Section 2-5 of the Ordinance places a forty-five-day time limit on the Administrator's decision to grant or deny the license. We agree with other federal courts that have found similar time limits to be reasonable. *E.g., Wolff v. City of Monticello,* 803 F.Supp. 1568, 1574 (D.Minn.1992) (ninety days); *Ellwest Stereo Theater, Inc. v. Boner,* 718 F.Supp. 1553, 1571 (M.D.Tenn.1989) (sixty days). Nevertheless, two other provisions of the Ordinance create the risk that expressive activity will be suppressed for indefinite time periods.

First, under section 2-5, the forty-five-day time limit is illusory, in that the Administrator's failure to comply with the time limit does not necessarily allow the applicant to begin engaging in the expressive activity for which the license is sought. Section 2-5(a)(1) of the Ordinance provides that in the event the Administrator exceeds the 45-day time limit, "the applicant *may* be permitted to begin operating the establishment for which a license is sought, unless and until the County Administrator notifies the applicant of a denial of the application." Citrus County Ordinance No. 88-05, § 2-5(a)(1) (emphasis added). Dean argues that the word "may" in the provision should be interpreted to mean "shall" because the

Ordinance gives operators "an absolute right" to begin operating establishments immediately upon the expiration of the forty-five-day period. Appellant's Brief at 41. He contends that the Board has applied the provision in this manner and that we should defer to the Board's interpretation.

We disagree. Redner presents a facial challenge to the Ordinance, and we must analyze it as written. "The issue . . . is whether the ordinance, on its face, meets the requirements of *FW/PBS.*" *Wolff,* 803 F.Supp. at 1575. We cannot depend on the individuals responsible for enforcing the Ordinance to do so in a manner that cures it of constitutional infirmities. Section 2-5 says that applicants *may* be permitted to begin operation; it does not say "shall." We do not read this language to create an absolute right to operate at the expiration of forty-five days. On its face, therefore, section 2-5(a)(1) risks the suppression of protected expression for an indefinite time period prior to any action on the part of the decisionmaker or any judicial determination.

A second provision of the Ordinance also may result in the indefinite suppression of expressive activity. In the event the Administrator denies the license, section 6-1 provides the applicant fifteen days to appeal the decision to the Board. Citrus County Ordinance No. 88-05, § 6-1(1). The Ordinance then directs the Clerk of the Board to "schedule a hearing for *as soon as the Board's calendar will allow.*" *Id.* § 6-1(2) (emphasis added). No time limit is placed on the Board. Like section 2-5, this appeal mechanism creates the risk that protected expression will be restrained for an indefinite time period prior to any form of judicial review. Thus, based on these two provisions, we find that the Ordinance fails to impose reasonable time limits on the decisionmaker, as required by *Freedman* and *FW/PBS.*

Appendix B

2. *Prompt Judicial Review*

The next *Freedman* procedural safeguard required by the Supreme Court in *FW/PBS* is the assurance of prompt judicial review. The Court, however, has not clarified exactly what type of judicial review is sufficient to fulfill this requirement, and our Circuit has never squarely addressed the issue in the context of a licensing ordinance.[9] Nevertheless, we find that the Citrus

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9. Our review of the relevant caselaw reveals that most courts have taken one of two tacks in interpreting the requirement of prompt judicial review. In the *Freedman* case itself, the Court was unclear as to exactly what type of judicial review was required. In later cases, however, the Court indicated that the statute, regulation, or ordinance itself must explicitly provide for prompt judicial review of the decision to suppress expressive activity. *E.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561-62, 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975). In *Southeastern Promotions,* the Court reviewed a municipal board's decision to reject an application to perform the musical "Hair" at a city auditorium. Within a few days of the denial, the federal district court had held hearings on a motion for a preliminary injunction. The court denied the preliminary injunction. But within five months the district court heard the merits of the action for an injunction. Nevertheless, the Supreme Court held that the procedural safeguards of *Freedman* were lacking because "[t]he board's system did not provide a procedure for prompt judicial review." *Id.* at 561, 95 S.Ct. at 1248. The Court thus implied that a state's statutory or common-law mechanisms for review of administrative decisions does not satisfy the procedural requirements of *Freedman.*

The second interpretation of "prompt judicial review" has been articulated most clearly by the Seventh Circuit in *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir.1993) (en banc), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1837, 128 L.Ed.2d 464 (1994). There, the court reviewed a Chicago licensing ordinance regulating newsstands. The ordinance made no mention of judicial review. The court stated:

> As an initial matter, it is not clear why the Court in *Freedman* set out the apparent requirement that an ordinance such as this explicitly provide for prompt

(Cont'd)

Appendix B

County Ordinance is inadequate under any interpretation of "prompt judicial review" because it creates the risk that expressive activity could be suppressed indefinitely prior to any judicial review of the decision to deny a license.

As we noted above,[10] section 6-1 of the Ordinance creates a situation where the denial of a license by the Administrator could result in the suppression of expressive activity for an indefinite

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(Cont'd)

> judicial review. A person always has a judicial forum when his speech is allegedly infringed. [Neither party] argues that the judiciary cannot hear challenges to this ordinance simply because it does not have a specific provision designating a review process.

Id. at 1324. The court went on to find that Illinois's common-law writ of certiorari was the appropriate method for reviewing administrative agency decisions and that such review was a sufficient procedural safeguard. *Id.* at 1325. The court acknowledged that Supreme Court cases seemed to reject this view, but stated that the High Court had never directly addressed the argument. *Id.*

Although we have never addressed the issue squarely, our Circuit seems to adhere to the first school of thought. In *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), we struck down a city ordinance requiring permits for demonstrations. Judge Henderson's concurrence, which was specifically accepted by the majority, focused on the fact that the licensing ordinance lacked a provision for prompt judicial review. *Id.* at 1526-27 (Henderson, J., concurring). Likewise, in *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 676 (11th Cir. 1984), we struck down a city licensing ordinance on the grounds that it lacked adequate procedural safeguards, stating that "the statute furnishes no means for judicial review, prompt or otherwise, of city commission decisions." In neither case, however, did we directly confront whether Florida's statutory or common-law means of judicial review were adequate procedural safeguards.

10. *See* discussion *supra* part II.A.1.

period of time. After an applicant appeals to the Board, the Ordinance provides no specific time frame in which the Board must schedule a hearing or reach a decision. During this time, judicial review of the Administrator's decision would not be available because the administrative action would still be pending.

Dean argues that prompt judicial review is available in spite of this problem. He contends that an applicant may forgo the appellate process provided by the statute and proceed immediately to Florida state court via Florida's common-law writ of certiorari. We reject Dean's argument for two reasons. First, we find it repugnant to the principle of due process that a county ordinance could set such a trap for the unwary applicant. To hold that an aggrieved applicant who follows the appellate procedure provided by the Ordinance risks foreclosing his opportunity for prompt judicial review is a leap in logic we are unprepared to take.

Second, an applicant who refuses to appeal to the Board, as provided by the Ordinance, runs the risk that a state court would decline review based on failure to exhaust administrative remedies. Under Florida law, exhaustion "is a question of judicial policy, not jurisdiction." *Florida Soc'y of Newspaper Editors, Inc. v. Florida Pub. Serv. Comm'n,* 543 So.2d 1262, 1266 (Fla.Dist.Ct.App.), *review denied,* 551 So.2d 461 (Fla.1989). Nevertheless, Florida law is clear that exhaustion of administrative remedies is a prerequisite for judicial review. "Where a method of appeal from an administrative ruling has been provided, such method must be followed to the exclusion of any other system of review. Where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act." *Florida Welding & Erection*

Appendix B

Serv., Inc. v. American Mut. Ins. Co., 285 So.2d 386, 389-90 (Fla.1973).

Dean argues that exhaustion does not prohibit an applicant from challenging the denial of a license in court because exhaustion is not required where a party challenges the constitutionality of a rule or regulation. While Dean is correct that exhaustion is not required for constitutional attacks, his argument misses the point. It assumes that an applicant's appeal of the denial of a license will always be a constitutional attack. We can envision other, non-constitutional grounds on which an applicant would challenge the denial of a license, any of which would require exhaustion of administrative remedies. An applicant posing a non-constitutional challenge to the denial of a license would therefore be barred from the court system unless he first exhausted his administrative remedies by appealing to the Board. And once this appeal is filed with the Board, the Ordinance provides no time limit in which the Board must schedule a hearing. Since Redner poses a facial challenge to the Ordinance, it must provide procedural safeguards for all applicants, not just those who might challenge the Ordinance on constitutional grounds. We thus reject Dean's argument that the Citrus County Ordinance satisfies the procedural requirement of prompt judicial review.

B. The Release Of Butterworth From Responsibility

Dean also appeals the district court's decision to amend its judgment, thereby releasing Butterworth from costs and from the responsibility for setting aside the conviction. He maintains that the Florida Attorney General has a constitutional, statutory, and common-law duty to represent the State in this action. We review the district court's decision to amend the judgment for abuse of

discretion. *Cable/Home Communication Corp. v. Network Prods, Inc.*, 902 F.2d 829, 859 (11th Cir.1990).

We find no such abuse of discretion in the district court's decision. Dean confuses the Attorney General's mandatory duty to represent the State with its discretionary authority to intervene in lawsuits in which the State has an interest. The instant case does not come within the Attorney General's mandatory duty.

Florida statutory law requires the attorney General to "appear in and attend to, in behalf of the state, all suits . . . in which the state may be a party, or in anywise interested." Fla.Stat.Ann. § 16.01(4). Although Rule 4 of the Rules Governing Section 2254 Cases requires that the state attorney general be served, the advisory committee notes to that rule make clear that the attorney general "is not required to answer if it is more appropriate for some other agency to do so." 28 U.S.C. § 2254 Rule 4, advisory committee notes. Here, the habeas petition involved a conviction under a county ordinance. Redner was not a state prisoner, and no state statute or state official was involved. Thus, the State of Florida is neither a party nor does it have an interest in these proceedings. For these same reasons, this case does not require Butterworth to exercise his discretionary authority under the common law to intervene in cases where public interest requires. *See generally Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir.1983), *cert. denied*, 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984). Therefore, we hold that the district court did not abuse its discretion in amending the judgment to release Butterworth from responsibility in this case.

III. CONCLUSION

Dean brought this appeal challenging the district court's

grant of Redner's habeas corpus petition, setting aside his convictions under the Citrus County Adult Entertainment Ordinance. Dean also appeals the district court's decision to amend its judgment releasing Attorney General Butterworth from responsibility in the case. We have carefully reviewed both issues, and, finding no reversible error, we AFFIRM.

APPENDIX C — ORDER DENYING PETITION FOR REHEARING FILED NOVEMBER 2, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-3033

JOSEPH RICHARD REDNER,

Petitioner-Appellee,

versus

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Respondent-Appellant,

ROBERT A. BUTTERWORTH,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: ANDERSON and BIRCH, Circuit Judges, and ALBRITTON*, District Judge.

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* Honorable W. Harold Albritton, III, U. S. District Judge for the Middle District of Alabama, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

* * *

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

APPENDIX D — SEPTEMBER 15, 1992 AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NUMBER: 91-90-Civ-OC-10

JOSEPH RICHARD REDNER,

V.

CHARLES S. DEAN, etc., et al.,

AMENDED JUDGMENT IN A CIVIL CASE

* * *

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order, filed on September 15, 1992, IT IS ORDERED THAT:

> The Judgment entered on May 18, 1992 is *amended* to relieve Respondent, ROBERT BUTTERWORTH, from responsibility for costs and of setting aside petitioner's judgment of conviction.

September 15, 1992
Date

DAVID L. EDWARDS
Clerk

Appendix D

Copies to:
Counsel of record

s/ Evelyn Stout
(By) Deputy Clerk

APPENDIX E — MAY 18, 1992 JUDGMENT OF UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CASE NUMBER: 91-90-Civ-Oc-10

JOSEPH RICHARD REDNER,

Petitioner,

V.

CHARLES S. DEAN, Sheriff of Citrus County, FL, and ROBERT BUTTERWORTH, Attorney General of the State of Florida,

Respondents.

JUDGMENT IN A CIVIL CASE

* * *

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's Order filed this date, the Magistrate Judge's Report and Recommendation is adopted and confirmed as the decision of the Court.

Appendix E

Petitioner's Petition for Writ of Habeas Corpus is GRANTED and Respondents are directed to forthwith take all action necessary to set aside the Petitioner's judgment of conviction and to release and discharge him from any further restraint of any kind in consequence of that judgment. Accordingly, costs shall be assessed according to law.

May 18, 1992
Date

DAVID L. EDWARDS
Clerk

c: counsel of record

s/ Jamie S. Fisher
(By) Deputy Clerk

APPENDIX F — MAY 18, 1992 ORDER OF UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA (ADOPTING AND APPROVING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CASE NO. 91-90-Civ-Oc-10

JOSEPH RICHARD REDNER,

Petitioner,

-vs-

CHARLES S. DEAN, Sheriff of Citrus County, Florida, and ROBERT BUTTERWORTH, Attorney General of the State of Florida,

Respondents.

ORDER

This case is before the Court for consideration of a Report and Recommendation by the Magistrate Judge that the Petitioner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be granted. The Respondents have filed timely objection to the Magistrate Judge's Report and the Court has considered those objections and the briefs of the parties addressing them.

At issue is the facial constitutionality of Citrus County Ordinance 88-05 under which the Petitioner was prosecuted and

convicted in State court. Ordinance 88-05 establishes a licensing requirement for adult entertainment establishments and the Magistrate Judge, applying *FW/PBS, Inc. v. City of Dallas*, __ U.S. __, 110 S.Ct. 596 (1990), concluded that the ordinance is unconstitutional on its face because it provides neither a reasonable, specific time limit within which the decisionmaker must issue the license, nor an avenue for prompt judicial review.

I agree with the well reasoned decision of the Magistrate Judge and his Report and Recommendation is therefore adopted and confirmed as the decision of the Court. It follows that the Petitioner's petition for a writ of habeas corpus is GRANTED and the Respondents are directed to forthwith take all action necessary to set aside the Petitioner's judgment of conviction and to release and discharge him from any further restraint of any kind in consequence of that judgment. The Clerk is directed to enter judgment accordingly and to assess costs according to law.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 18th day of May, 1992.

s/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Hon. John E. Steele
Courtroom Deputy

APPENDIX G — MARCH 4, 1992 REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Case No. 91-90-Civ-Oc-14

JOSEPH RICHARD REDNER,

Petitioner,

v.

CHARLES S. DEAN, etc.; et al.,

Respondents.

REPORT AND RECOMMENDATION

I. Status

This case is before the Court on Petitioner's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254 on April 22, 1991. (Doc. #1). Petitioner seeks relief from three county court convictions for Operating An Adult Entertainment Establishment Without An Adult Entertainment License in violation of Citrus County Ordinance 88-05. He contends the ordinance lacks adequate procedural safeguards and is therefore unconstitutional on its face. Specifically, Petitioner contends that the ordinance fails to provide specific time limits on any restraint of expression prior to judicial review and that it fails to provide any adequate

prompt judicial review or appellate remedy of the denial of the license. Petitioner also contends that the ordinance is not within the State's power to enact and is an impermissibly "chilling" restriction in violation of the First and Fourteenth Amendments. Petitioner alleges that five specific sections of the Ordinance render it unconstitutional on its face.

Respondents assert Petitioner has failed to exhaust his state court remedies because Petitioner did not appeal the denial of his Rule 3.850 motion (Doc. #5, Ex. D). Rule 3.850 Florida Rules of Criminal Procedure. Petitioner contends he has exhausted all remedies on appeal to the Circuit Court of the Fifth Judicial Circuit and on Petition for Writ of Certiorari to the Fifth District Court of Appeal.

The issues have been fully briefed by the parties. Petitioner filed documents and an extensive Memorandum or Law in support of Petition for Writ of Habeas Corpus on May 7, 1991, and May 8, 1991, respectively. (Docs. #8, 9). Respondent Dean filed a Brief Opposing the Petition on June 4, 1991 (Doc. #15), which was adopted by the Attorney General of Florida on September 30, 1991 (Doc. # 23). On June 21, 1991, Petitioner filed a reply brief (Doc. #18). Additionally, the parties filed supplemental memoranda addressing *Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456 (1991), on July 12, 1991 (Doc. #20), and July 18, 1991 (Doc. #21).

II. Findings of Fact

Before March 24, 1988, Petitioner had received all permits and licenses required to operate an adult entertainment establishment in an unincorporated portion of Citrus County, Florida. On March 25, 1988, the Board of County Commissioners

of Citrus County, Florida, adopted "emergency" Ordinance No. 88-05, entitled "Citrus County Adult Entertainment Ordinance."[1] Petitioner's Exhibit A, filed May 7, 1991. (Doc. #8).

Pursuant to this ordinance, a person must obtain a license before operating certain types of establishments, including one which features nude dancing. Ultimate responsibility for the administration of the ordinance and issuance of the license is vested in the Board of County Commissioners. A person seeking to operate such a business must submit a written application, pay a fee, and be subject to various investigations. All applicants are deemed to have consented to the provisions of the ordinance. Four different government departments then investigate the applicant and report to the County Administrator their approval or rejection of the application. The County Administrator "shall" grant or deny an application within 45 days of its proper filing. However, upon the expiration of the 45 day period "the applicant may be permitted to begin operating the establishment for which a license is sought, unless and until the County Administrator notifies the applicant of a denial of the application and states the reason(s) for the denial." An applicant may file a notice of appeal from the denial of a license with the Board and a hearing "as soon as the Board's calendar will allow" will be scheduled. If the Board concludes that the license "should not have been denied",

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1. Ordinance 88-05 has been superseded by Ordinance 88-06. Petitioner's convictions are under Ordinance 88-05, and the same procedural aspects are present in both ordinances. As Respondents concede, except for two subsections the two ordinances are virtually identical. (Doc. #15, p.5, n.8). Two 42 U.S.C. § 1983 cases challenging the validity of these ordinances are pending in this Court, Case Nos. 88-50-Civ-Oc-12 and 88-193-Civ-Oc-12. See *Redner v Citrus County, Florida*, 919 F.2d 646 (11th Cir. 1990), *reh'g denied*, 935 F.2d 1297, *cert. denied* 112 S.Ct. 303 (1991).

the County Administrator is notified and a license is issued. No provision is made for judicial review. Section 5-15 of the Ordinance provides violators may be prosecuted and punished pursuant to § 125.69, Florida Statutes (1985).

From March 29, 1988, through March 31, 1988, Petitioner was arrested and charged three times for operating an adult entertainment establishment without a license in violation of Ordinance No. 88-05. Petitioner was convicted of the three charges on October 6, 1988, and sentenced on October 17, 1988, as follows: (1) Case No. 88-2595 MM 01, committed to sixty (60) days in the Citrus County Jail; (2) Case No. 88-2597 MM 01, placed on probation for a period of six (6) months (consecutive to the jail time in Case No. 88-2595 MM 01); and (3) Case No. 88-2721 MM 01, placed on probation for a period of six (6) months (consecutive to Case No. 88-2597 MM 01). Petitioner began serving his sentence April 29, 1991, with credit for thirteen days of jail time served.

There is no factual dispute surrounding the conduct of Petitioner. Petitioner admits he did not file an application or receive the license required by Ordinance No. 88-05, and that his conduct violated the ordinance as written.

Petitioner appealed the county court convictions to the Circuit Court of the Fifth Judicial Circuit, which affirmed the convictions and issued its mandate on August 13, 1990. Petitioner's Exhibit F, filed May 7, 1991. Thereafter, Petitioner filed a Petition for Writ of Certiorari with the Fifth District Court of Appeal which was denied August 31, 1990. Petitioner's Exhibit G, filed May 7, 1991. (Doc. #8). Finally, Petitioner filed a Motion for Rehearing which was denied September 28, 1990. Petitioner's Exhibit H, filed May 7, 1991. (Doc. #8).

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Petitioner also attempted to collaterally attack his convictions through a Rule 3.850 motion for post-conviction relief. However, the County Court of the Fifth Judicial Circuit struck the motion for the following reasons: (1) "Rule 3.850 states that a Motion for Post-Conviction Relief cannot be based upon grounds which could have or should have been raised a [sic] trial and, if properly preserved, on direct appeal of the judgement [sic] and sentence"; (2) "Defendant's Motion for Post-Conviction Relief raises the issue of the constitutionality of the ordinance under which the Defendant was convicted"; and (3) "The constitutionality of the ordinance under which the Defendant was convicted was previously raised in a pretrial motion to dismiss and was one of the issues raised by Defendant on direct appeal." Petitioner's Exhibit D, filed May 6, 1991. (Doc. #5).

III. Conclusions of Law

A. Evidentiary Hearing

Petitioner has not sought an evidentiary hearing in this federal habeas corpus proceeding, and the Court has independently reviewed the record and concludes that Petitioner is not entitled to an evidentiary hearing, even if he had requested one. Petitioner's challenge is to the facial validity of the ordinance and no material facts are in dispute.

B. Exhaustion

The Court rejects Respondents argument that Petitioner failed to exhaust his state court remedies by failing to appeal the denial of his Rule 3.850 motion. Petitioner presented his constitutional claims at trial and on direct review and they were

rejected by the State courts. No collateral proceedings were or are necessary for exhaustion purposes: "[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner 'to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review.' " *Castille v. Peoples*, 488 U.S. 346, 350 (1989) (quoting Brown v. Allen, 344 U.S. 443, 447 (1953)). The constitutional claims presented here have been sufficiently exhausted. *See Hutchins v. Wainwright*, 715 F.2d 512, 519 (1983), *cert. denied*, 465 U.S. 1071 (1984). *See also Watson v. Dugger*, 945 F.2d 367, 371 (11th Cir. 1991); *Blanco v. Singletary*, 943 F.2d 1477, 1499 (11th Cir. 1991).

C. Ordinance No. 88-05

Petitioner's first ground in his Petition is that County Ordinance No. 88-05 is a licensing scheme which constitutes a prior restraint on constitutionally protected expression without providing adequate procedural safeguards. Specifically, Petitioner alleges, it fails to provide reasonable time limits on any restraint of expression prior to judicial review and it fails to provide any adequate, prompt judicial review of the denial of the license.

It is well-settled that obscenity is not protected by the First Amendment. Non-obscene nude dancing has been assumed in prior Supreme Court cases to be "expressive conduct within the outer perimeters of the First Amendment." *International Eateries of America Inc. v. Broward County*, 941 F.2d 1157, 1159 (11th Cir. 1991). There is no claim in this case that the nude dancing at Petitioner's establishment was obscene, or that Ordinance 88-05 applies only to obscene nude dancing[2]. The parties have assumed

2. Ordinance 88-05 clearly applies to both obscene and non-obscene nude dancing. *See* Section 1-8.

that the conduct involved in this case is entitled to First Amendment protection and that the ordinance must comply with First Amendment safeguards. Respondents concede that Ordinance 88-05 contains "an element of prior restraint" (Doc. #15, p. 9). They assert, however, that the restraint is proper because it complies with appropriate First Amendment safeguards. The Court will therefore assume, as the parties and the Supreme Court have done, that nude dancing is "expressive conduct within the outer perimeters of the First Amendment. . . ."

A licensing scheme regulating commercial establishments impacting First Amendment rights is not *per se* invalid, but it must contain certain safeguards. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Any such system of prior restraints of expression bears a heavy presumption against its constitutional validity. *FW/PBS Inc. v. City of Dallas,* 110 S.Ct. 596, 604 (1990); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). The two identified evils which will not be tolerated in such a system are unbridled discretion in the hands of a government official or agency and a scheme which fails to place limits on the time within which the decision maker must issue the license. *FW/PBS, Inc.*, 110 S.Ct. at 605. The Supreme Court stated:

> In *Freedman*, we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be

> available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Id. at 606 (citation omitted). The Court plurality then held that only the first two safeguards are required where, as here, the licensing scheme does not present the grave dangers of a censorship system. "Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.' *Bantam Books Inc. v. Sullivan*, 372 U.S. 58, 66 (1963)." *Id.* at 607.

This Court concludes that Ordinance 88-05 fails to comply with either of the *FW/PBS, Inc.* required safeguards. It fails to provide a reasonable, specific time limit by which the decisionmaker must issue the license. It also fails to provide an avenue for *prompt judicial* review.

The Ordinance provides that the County Administrator must approve or disapprove of the application within 45 days, but this time limitation is illusory. If no decision is reached, the applicant "may" be allowed to operate the business until a decision is rendered. This state of limbo, without any time restrictions, does not comply with the procedural safeguard that a final decision be reached within a prompt period of time. The economic realities of business are such that such a tentative decision, subject to revocation at any time, is tantamount to no decision at all.

The Ordinance provides that within 15 days of denial of the license by the County Administrator the applicant may file a

notice of appeal with the Board of Commissioners, the body who has the ultimate authority to make the decision. The matter is then scheduled for a hearing by the Board "as soon as the Board's calendar will allow". No time limitation is placed upon the scheduling of such a hearing. Additionally, no time limitation is placed upon the Board deciding the issue.[3] Ordinance No. 88-05 fails to provide for *any judicial* review, speedy or otherwise. The lack of judicial review is fundamentally defective to the regulatory scheme. *See Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1526 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); *Miami Herald Publishing Co. v. City of Hollandale*, 734 F.2d 666, 676, clarified by, 742 F.2d 590 (11th Cir. 1984). "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the

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3. (1) Subject to subsection 3-1 (a) (2), within fifteen (15) days of the mailing of a notice of denial of an application for a license or a notice of suspension or revocation of a license or permit, the aggrieved party may file a notice of appeal with the Board.

(2) The notice of appeal shall be filed with the Clerk of the Board. The notice of appeal shall be accompanied by payment of a filing fee of fifty dollars ($50.00) to cover administrative costs. Upon receipt of the notice of appeal and upon payment of the accompanying fifty dollars ($50.00) filing fee, the Clerk shall schedule a hearing for a soon as the Board's calendar will allow. The Clerk shall provide the appellant with at least ten (10) days' notice of time and place for the hearing.

(3) If, at the conclusion of the hearing, the Board finds the license or permit should not have been denied, suspended, revoked, or cancelled, it shall so notify the County Administrator, who shall immediately grant or reissue the license or permit.

Petitioner's Exhibit A, filed May 7, 1991, at 24.

necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Freedman*, 380 U.S. at 58.

Respondents' suggestion that judicial review is available by virtue of a criminal prosecution, a habeas corpus proceeding or a Section 1983 suit is not persuasive. The judicial review required to satisfy the First Amendment is a review of the decision to deny the license, not an action to stay out of jail or recover monetary damages for violation of rights. No such judicial review is provided by this statute.

In conclusion, Citrus County Ordinance No. 88-05 fails to provide essential procedural safeguards against undue inhibition of protected expression and is unconstitutional on its face. The Court will not reach Petitioner's other claims since the Court has found the ordinance to be facially unconstitutional based on ground one.

RECOMMENDATION[4]

The Petition for Writ of Habeas Corpus be GRANTED.

DONE AND ENTERED at Jacksonville, Florida, this 3rd day of March, 1992.

s/ John E. Steele
UNITED STATES MAGISTRATE JUDGE

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4. Any party may file and serve objections hereto within TEN (10) DAYS after service of this opinion. Failure to do so shall bar the party from a *de novo* determination by a district judge of an issue covered herein and from attacking factual findings on appeal. *See* 28 U.S.C. § 636; *Thomas v. Arn*, 474 U.S. 140 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); Rule 72(b), Federal Rules of Civil Procedure; and Local Rule 6.02.

Appendix G

Copies to:
Luke Charles Lirot, Esquire
Thomas C. Little, P.A.

Russell W. LaPeer, Esquire
Pattillo & McKeever, P.A.

Ass't Attorney General (Morgan)

APPENDIX H — CITRUS COUNTY, FLORIDA ORDINANCE NO. 88-05

ORDINANCE NO. 88-05

AN ORDINANCE OF CITRUS COUNTY, FLORIDA, TO BE KNOWN AS THE "ADULT ENTERTAINMENT ORDINANCE"; PROVIDING GENERAL PROVISIONS, FINDINGS OF FACT AND DEFINITIONS; PROVIDING PROVISIONS CONCERNING LICENSING ENTERTAINMENT ESTABLISHMENTS; PROVIDING PROVISIONS CONCERNING PERMITTING OF EMPLOYEES OF ADULT ENTERTAINMENT ESTABLISHMENTS; PROVIDING PROVISIONS CONCERNING REQUIREMENTS FOR ADULT ENTERTAINMENT ESTABLISHMENTS; PROVIDING CRIMINAL PROVISIONS; PROVIDING PROVISIONS REGARDING SUSPENSION AND REVOCATION OF LICENSE; PROVIDING PROVISIONS REGARDING SUSPENSION AND REVOCATION OF PERMIT; PROHIBITING ESTABLISHMENTS FROM OPERATING BETWEEN HOURS OF 2:00 A.M. AND 9:00 A.M.; PROHIBITING HOLES IN WALLS OF ADULT BOOTHS; PROHIBITING THE ALTERATION OF A LICENSE OR PERMIT; PROHIBITING FALSE STATEMENT OR FALSE INFORMATION IN APPLYING FOR A LICENSE OR PERMIT; PROVIDING FOR SEVERABILITY;

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PROVIDING FOR EMERGENCY ENACTMENT AND AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF CITRUS COUNTY, FLORIDA:

SECTION 1. GENERAL PROVISIONS

Section 1-1. Title. This Ordinance shall be known and may be cited as the "Citrus County Adult Entertainment Ordinance".

Section 1-2. Authority. The Adult Entertainment Ordinance is enacted under the Home Rule Power of Citrus County, Florida, in the interest of the health, peace, safety, morals, and general welfare of the people of Citrus County, and under the authority of Citrus County to regulate the sale and consumption of alcoholic beverages under the Twenty-First Amendment to the Constitution of the United States.

Section 1-3. Scope. The Adult Entertainment Ordinance shall be effective throughout Citrus County, Florida, except that no provision of this Ordinance that conflicts with a provision of an Ordinance of any municipality within Citrus County, Florida, shall be effective within such municipality.

Section 1-4. Construction. The Adult Entertainment Ordinance shall be liberally construed to accomplish its purpose of licensing, regulating and dispersing adult entertainment and related activities. Unless otherwise indicated, all provisions of this Ordinance shall apply equally to all persons, regardless of sex. Masculine pronouns, such as "he", "his" , and "him", as employed in this Ordinance, shall also be construed to apply to

feminine pronouns and neutral pronouns, unless the context suggests otherwise. Words used in the singular number shall include the plural number, unless the context suggests otherwise.

Section 1-5. Purpose. The intent of the Board of County Commissioners of Citrus County, Florida, in adopting the Adult Entertainment Ordinance is to establish reasonable and uniform regulations that will protect the health, safety, morals and general welfare of the people of Citrus County, Florida.

Section 1-6. Findings of Fact. Based on evidence and testimony concerning the adverse secondary effects of adult uses on the community presented at public hearings before the Board of County Commissioners of Citrus County, Florida, and on the findings incorporated in the *City of Renton v. Playtime Theaters, Inc.,* 106 S.Ct. 925 (1986); *Coleman A. Young v. American Mini Theaters, Inc.,* 427 US 50, 49 L Ed 2d 310, 96 S Ct 2440, reh den (US) 50 L Ed 2d 155, 97 S Ct 191; Summary and presentation of reports, studies and judicial opinions concerning the adverse secondary effects of adult uses on the community; *Northend Cinema, Inc. v. Seattle,* 90 Wash. 2d 709, 585 P.2d 1153 (1978); *A Report on Zoning and Other Methods of Regulating Adult Entertainment in Amarillo,* Texas dated September 12, 1977; *Regulation of Criminal Activity and Adult Businesses.* City of Phoenix, May, 1979; Findings of the City Planning Commission for the City of New York dated January 26, 1977; *Detroit's Approach to Regulating the "Adult" Uses* Presented to American Institute of Planners Annual Conference, October 10, 1977; *Adult Entertainment Businesses in Indianapolis.* An Analysis, 1987; and a presentation of the Citrus County Sheriff officers detailing the potential criminal activities associated with adult uses in Citrus County:

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(a) Establishments exist or may exist within Citrus County, Florida, where books, magazines, motion pictures, prints, photographs, periodicals, records, novelties and/or devices which depict, illustrate, describe or relate to specified sexual activities are possessed, displayed, exhibited, distributed and/or sold.

(b) Establishments exist or may exist within Citrus County, Florida:

(1) where the superficial tissues of one person are manipulated, rubbed, stroked, kneaded, and/or tapped by a second person, accompanied by the display or exposure of specified anatomical areas;

(2) where dancers, entertainers, performers, or other individuals, who, for any form of commercial gain, perform or are presented while displaying or exposing any specified anatomical area; or

(3) where straddle dancing occurs.

(c) The activities described in subsections (a) and (b) occur at establishments for the purpose of making a profit, and, as such, are subject to regulation by Citrus County, Florida, in the interest of the health, safety, morals and general welfare of the people of Citrus County.

(d) When the activities described in subsections (a) and (b) are present in establishments within Citrus County, Florida, other activities which are illegal, immoral, or unhealthful tend to accompany them, concentrate around them, and be aggravated by them. Such other activities include, but are not limited to,

prostitution, pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful materials, possession, distribution and transportation of obscene materials, sale and possession of controlled substances, and violent crimes against persons and property.

(e) When the activities described in subsections (a) and (b) are present in establishments within Citrus County, Florida, they tend to attract an undesirable number of transients, blight neighborhoods, adversely affect neighboring businesses, lower property values, promote crime, particularly the kinds detailed in subsection (d) and ultimately lead residents and businesses to move to other locations.

(f) The establishments in which the activities described in subsections (a) and (b) occur are usually constructed, in part or in whole, of substandard materials, and are usually maintained in a manner reflecting disregard for the health and safety of the occupants.

(g) The activities described in subsections (a) and (b) frequently occur in establishments concurrent with the sale and consumption of alcoholic beverages.

(h) The concurrence of the sale and consumption of alcoholic beverages with the activities described in subsections (a) and (b) leads to an increase in criminal activity, moral degradation, and disturbances of the peace and order of Citrus County, Florida.

(i) The concurrence of the sale and consumption of alcoholic beverages with the activities described in subsections (a) and (b) is hazardous to the health and safety of those persons

in attendance, depreciates the value of adjoining property, harms the economic welfare of Citrus County, Florida, and adversely affects the public's interest in the quality of life, tone of commerce, and community environment in Citrus County.

(j) In order to preserve and safeguard the health, safety, morals and general welfare of the people of Citrus County, Florida, it is necessary and advisable for Citrus County, Florida, to regulate the sale and consumption of alcoholic beverages at establishments where the activities described in subsections (a) and (b) occur.

(k) Employees of establishments at which the activities described in subsections (a) and (b) occur engage in a higher incidence of certain types of criminal behavior than employees of other establishments.

(l) Physical contact within establishments at which the activities described in subsections (a) and (b) occur between employees exhibiting specified anatomical areas and customers poses a threat to the health of both and promotes the spread of communicable and social diseases.

(m) In order to preserve and safeguard the health, safety, morals, and general welfare of the people of Citrus County, Florida, it is necessary and advisable for Citrus County, Florida, to regulate the conduct of owners, managers, operators, agents, employees, entertainers, performers, and customers at establishments where the activities described in subsections (a) and (b) occur.

(n) The potential dangers to the health, safety, morals, and general welfare of the people of Citrus County, Florida, posed by

permitting an establishment at which the activities described in subsections (a) and (b) occur to operate without first obtaining a license under this Ordinance are so great as to require the licensure of such establishments prior to their being permitted to operate.

(o) Requiring employees of establishments at which the activities described in subsections (a) and (b) occur to obtain an adult entertainment permit before beginning to work in such establishments will help reduce the incidence of certain types of criminal behavior by facilitating the identification of potential witnesses or suspects, by preventing minors from working in such establishments, and by making it easier for health officials to control the spread of communicable and social diseases in such establishments.

(p) Prohibiting establishments at which the activities described in subsections (a) and (b) occur from operating within close proximity of education institutions, religious institutions, areas zoned for residential use, and parks, at which children are customarily found, will serve to protect children from the adverse affects of the activities that accompany such establishments.

(q) Personal advertising within close proximity of public thoroughfares poses a traffic hazard and a threat to the safety of people using those thoroughfares.

(r) "Straddle dancing" does not contain any element of communication, and is therefore conduct rather than expression.

(s) "Straddle dancing" in establishments poses a threat to the health of the participants and promotes the spread of communicable and social disease.

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Section 1A-7. Definitions. In the Adult Entertainment Ordinance, unless the context suggests otherwise:

(a) "Adult Bookstore" means an establishment which sells or rents adult material, unless the adult material is accessible only by employees and either the gross income from the sale or rental of adult material comprises less than ten percent (10%) of the gross income from the sale or rental of goods or services at the establishment or the individual items of adult material offered for sale or rental comprises less than twenty-five percent (25%) of the individual items publicly displayed at the establishment as stock in trade. It is an affirmative defense to an alleged violation of this Ordinance regarding operating an adult bookstore without an adult entertainment license if the alleged violator shows that the adult material is accessible only by employees and either the gross income from the sale or rental of adult material comprises less than ten percent (10%) of the gross income from the sale or rental of goods or services at the establishment, or the individual items of adult material offered for sale or rental comprise less than twenty-five percent (25%) of the individual items publicly displayed at the establishment as stock in trade.

(b) "Adult Booth" means a small enclosure inside an adult entertainment establishment accessible to any person, regardless of whether a fee is charged for access. The term "adult booth" includes, but is not limited to, a "peep show" booth, or other booth used to view "adult material". The term "adult booth" does not include a foyer through which any person can enter or exit the establishment, or a restroom.

(c) "Adult Dancing Establishment" means an establishment where employees display or expose specified anatomical areas to others, regardless of whether the employees actually engage in dancing.

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(d) "Adult Entertainment Establishment" means an adult theater, an adult bookstore, or an adult dancing establishment operated for commercial or pecuniary gain. ("Operated for commercial or pecuniary gain" shall not depend upon actual profit or loss. Also, "operated for commercial or pecuniary gain" shall be presumed where the establishment has an occupational license.) An establishment with an adult entertainment license is presumed to be an adult entertainment establishment.

(e) "Adult Material" means any one or more of the following, regardless of whether it is new or used:

(1) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations, or recordings, or other audio matter, which have as their primary or dominant theme matter depicting, illustrating, describing or relating to specified sexual activities or specified anatomical areas; or

(2) Instruments, novelties, devices or paraphernalia which are designed for use in connection with specified sexual activities.

(f) "Adult Motel" means any motel, hotel, boarding house, rooming house or other place of temporary lodging which includes the word "adult" in any name it uses or otherwise advertises the presentation of films, motion pictures, video cassettes, slides or other photographic reproductions, which have as their primary or dominant theme matters depicting, illustrating or relating to specified sexual activities or specified anatomical areas. The term "adult motel" is included within the definition of "adult theater".

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(g) "Adult Theater" means an establishment which, except as set forth in the final sentence of this paragraph, consists of an enclosed building, or a portion or part of an enclosed building, or an open-air area used for viewing by persons of films, motion pictures, video cassettes, slides, or other photographic reproductions which have as their primary or dominant theme matters depicting, illustrating or relating to specified sexual activities or specified anatomical areas. "Adult motels" are included within the definition of "adult theater". An establishment which has "adult booths" is considered to be an "adult theater".

(h) "Alcoholic Beverage" means a beverage containing more than one percent (1%) of alcohol by weight.

(1) It shall be prima-facie evidence that a beverage is an alcoholic beverage if there is proof that the beverage in questions was or is known as whiskey, moonshine whiskey, shine, rum, gin, tequila, vodka, scotch, scotch whiskey, brandy, beer, malt liquor, or by any other similar name or names, or was contained in a bottle or can labeled as any of the above names, or a name similar thereto, and the bottle or can bears the manufacturer's insignia, name, or trademark.

(2) Any person who, by experience in the handling of alcoholic beverages, or who by taste, smell, or drinking of such alcoholic beverages has knowledge of the alcoholic nature thereof, may testify as to his opinion about whether such beverage is an alcoholic beverage.

(i) "Board" means the Board of County Commissioners of Citrus County, Florida.

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(j) "County Administrator" means the chief administrative officer or his designee.

(k) "Conviction" means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

(l) "Department" means the Building Department, Fire Prevention Division, Health Department, Sheriff, Zoning and Permits Division, or the Department of Development Services, including the respective director, employees, and agents thereof.

(m) "Educational Institution" means a premises or site upon which there is an institution of learning for minors, whether public or private, which conducts regular classes and/or courses of study required for eligibility to certification by, accreditation to, or membership in the State Department of Education of Florida, Southern Association of Colleges and Secondary Schools, or the Florida Council of Independent School. The term "educational institution" includes a premises or site upon which there is a nursery school, kindergarten, elementary school, junior high school, senior high school, or any special institution of learning. However, the term "educational institution" does not include a premises or site upon which there is a vocational institution, professional institution or an institution of higher eduction, including a community college, junior college, four year college or university.

(n) "Employee" means a person who works or performs in an adult entertainment establishment, irrespective of whether said person is paid a salary or wage by the owner or manager of the premises.

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(o) "Establishment" means a site or premises, or portion thereof, upon which certain activities or operations are being conducted for commercial or pecuniary gain. ("Operated for commercial or pecuniary gain" shall not depend upon actual profit or loss. Also, "operated for commercial or pecuniary gain" shall be presumed where the establishment has an occupational license.)

(p) "Inspector" means a respective employee of the Health Department, Building Department, Zoning and Permits Division, Sheriff, or Fire Prevention Division who inspects premises licensed under this Ordinance and takes or requires the actions authorized by this Ordinance in case of violations being found on licensed premises, and who also inspects premises seeking to be licensed under this Ordinance and takes or requires corrections of unsatisfactory conditions found on the premises.

(q) "Licensee" means any person whose application for an adult entertainment establishment has been granted and who owns, operates or controls the establishment.

(r) "Operator" means any person who engages in or performs any activity which is necessary to or which facilitates the operation of an adult entertainment establishment, including but not limited to the licensee, manager, owner, doorman, bartender, disc jockey, sales clerk, ticket taker, movie projectionist, or supervisor.

(s) "Park" means a tract of land within a municipality or unincorporated area which is kept for ornament and/or recreation and which is maintained as public property.

(t) "Permittee" means a person who has obtained an adult entertainment permit pursuant to SECTION 3 of this Ordinance.

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(u) "Person" includes, but is not limited to, an individual, associations, joint ventures, partnerships estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other or any other similar entity.

(v) "Private performance" means the display or exposure of any specified anatomical area by an employee at an adult entertainment establishment to a person other than another employee while the person is in an area not accessible during such display to all other persons in the establishment, or which the person is in an area in which the person is totally or partially screened or partitioned during such display from the view of all persons outside the area.

(w) "Religious institution" means a premises or site which is used primarily or exclusively for religious worship and related activities.

(x) "Specified anatomical areas" means:

(1) less than completely and opaquely covered:

(A) human genitals or pubic region; or

(B) cleavage of the human buttocks; or

(C) that portion of the human female breast enncompassed within an area falling below the horizontal line one would have to draw to intersect a point immediately above the top of the areola (the colored ring around the nipple). This definition shall include the entire lower portion of the human female breast, but shall not include any portion of the cleavage of the human female breast exhibited by a dress, blouse, shirt,

leotard, bathing suit, or other wearing apparel, provided the areola is not so exposed.

(2) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(y) "Specified criminal act" means:

(1) A criminal violation of this Ordinance;

(2) Any felony;

(3) An offense under Chapter 794, Florida Statutes (Sexual Battery);

(4) An offense under Chapter 796, Florida Statutes (Prostitution);

(5) An offense under Chapter 800, Florida Statutes (Lewdness; Indecent Exposure);

(6) An offense under Chapter 826, Florida Statutes (Bigamy; Incest);

(7) An offense under Chapter 847, Florida Statutes (Obscene Literature; Profanity); or

(8) An offense under an analogous statute of a state other than Florida, or under an analogous ordinance of another county or city.

(z) "Specified sexual activities" means;

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(1) human genitals in a state of sexual stimulation, arousal or tumescence; or

(2) acts of human analingus, beastiality, buggery, cunnilingus, coprophagy, coprophilia, fellation, flagellation, masochism, masturbation, necrophilia, pederasty, pedophilia, sadism, sadomasochism, sapphism, sexual intercourse, sodomy, urolagnia or zooerasty; or

(3) fondling or other erotic touching of human genitals, pubic region, buttock, anus or female breast; or

(4) excretory functions as part of or in connection with any of the activities set forth in subsections (1) through (3).

(aa) "Straddle dance" also known as a "lap dance" or "face dance", means the use by an employee, of any part of his or her body to touch the genital or pubic area of a person while at the establishment, or the touching of the genital or pubic area of any employee with a person while at the establishment. It shall be a "straddle dance" regardless of whether the "touch" or "touching" occurs while the employee is displaying or exposing any specified anatomical area. It shall also be a "straddle dance" regardless of whether the "touch" or "touching" is direct or through a medium.

Section 1-8. Regulation of Obscenity Subject to State Law. It is not the intent of the Board to legislate with respect to matters of obscenity. These matters are regulated by state law.

Section 1-9. Regulation of Massage Establishments Subject to State Law. It is not the intent of the Board to legislate with respect to matters of massage establishments. These matters are

regulated by state agency, the Department of Professional Regulation, Board of Massage, and by state law, Chapter 480, Florida Statutes.

Section 1-9. Severability. If any portion of this Ordinance, or any application thereof is declared to be void, unconstitutional or invalid for any reason, such portion or provision, or this application thereof, shall be severable from this Ordinance. The remaining portions and provisions of this Ordinance, and all applications thereof shall remain in full force and effect. No void, unconstitutional or invalid portion or proscribed provision, or application thereof, was an inducement to the enactment of this Ordinance.

SECTION 2. LICENSING PROVISIONS

Section 2-1. Responsibilities of Board, County Administrator and Departments. Ultimate responsibility for the administration of this Ordinance is vested in the Board. The County Administrator or his designee is responsible for granting, denying, revoking, renewing, suspending, and cancelling adult entertainment licenses for proposed or existing adult entertainment establishments. The Sheriff is responsible for verifying information contained on an application pursuant to Section 2-3(b) (1)-(5) of this Ordinance, for inspecting any proposed, licensed or non-licensed establishment in order to ascertain whether it is in compliance with applicable criminal statutes and ordinances, and for enforcing applicable criminal statutes and ordinances, including those set forth at SECTION 5 of this Ordinance. In addition, the Sheriff is responsible for reviewing permit applications, as provided in SECTION 3. The Building Department is responsible for inspecting any proposed establishment for which a license is being applied for or any

licensed establishment in order to ascertain whether it complies with or is complying with this Ordinance and all applicable building codes, statutes, ordinances, and regulations in effect in Citrus County, Florida. The Division of Fire Prevention is responsible for inspecting any proposed establishment for which a license is being applied for or any licensed establishment in order to ascertain whether it complies with or is complying with SECTION 4 of this Ordinance and all applicable fire codes, statutes, ordinances and regulations in Citrus County. The Health Department is responsible for any proposed establishment for which a license is being applied for or any licensed establishment in order to ascertain whether it complies with or is complying with SECTION 4 of this Ordinance and all applicable health codes, statutes, ordinances, and regulations in effect in Citrus County. In addition, the Health Department is responsible for reviewing permit applications, as provided in SECTION 3. The Zoning and Permits Division of the Department of Development Services is responsible for ascertaining whether a proposed establishment for which a license is being applied for complies with all locational requirements of this Ordinance, applicable portions of this Ordinance, all applicable zoning regulations in effect in Citrus County, and whether a licensed establishment is complying with SECTION 5 of this Ordinance and all applicable zoning regulations and land use laws in effect in Citrus County. The County Administrator is responsible for granting, denying, renewing, canceling, suspending, and revoking permits for proposed or current permittees in accordance with SECTION 3 of this Ordinance.

Section 2-2. Adult Entertainment License Required: Classifications of.

(a) *Requirement.* No adult entertainment establishment

shall be permitted to operate without having been first granted an adult entertainment license by the County Administrator under this Ordinance.

(b) *Classifications.* Adult entertainment establishment licenses referred to in this Ordinance shall be classified as follows:

(1) adult bookstore;

(2) adult theater; and

(3) adult dancing establishment.

(c) *Single Classification of License.* Any adult entertainment license for a particular adult entertainment establishment shall be limited to one classification of license.

Section 2-3. Application Required for Adult Entertainment License; Contents of; Application Fee; Rejection of Incomplete Application; Consent by Applicant.

(a) *Required.* Any person desiring to operate an adult entertainment establishment shall file with the County Administrator a sworn license application on a standard application form supplied by the County Administrator.

(b) *Contents of Application.* The completed application shall contain the following information and shall be accompanied by the following documents:

(1) if the applicant is:

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(A) an individual, the individual shall state his legal name and any aliases and submit satisfactory proof that he is eighteen (18) years of age; or

(B) a partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and, if in existence, a copy of the partnership agreement; or

(C) a corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing, the names and capacity of all officers, directors and principal stockholders, and, if applicable, the name of the registered corporate agent and the address of the registered office for service of process;

(2) if the applicant intends to conduct the establishment under a name other than that of the applicant, the establishment's fictitious name and the county of registration under Section 865.09, Florida Statutes (1987);

(3) whether the applicant or any of the other individuals listed pursuant to subparagraph (1) has, within the ten (10) year period immediately proceding the date of the application, been convicted of a specific criminal act, and, if so, the specified criminal act involved, the date of conviction and the place of conviction;

(4) whether the applicant or any of the other individuals listed pursuant to subparagraph (1) has had a previous license under this Ordinance suspended or revoked, including the name and location of the establishment for which the license was suspended or revoked, as well as the date of the suspension or

revocation, and whether the applicant or any other individuals listed pursuant to subparagraph (1) has been a partner in a partnership or an officer, director or principal stockholder of a corporation whose license under this Ordinance has previously been suspended or revoked, including the name and location of the establishment for which the license was suspended or revoked, as well as the date of the suspension or revocation;

(5) whether the applicant or any other individuals listed pursuant to subparagraph (1) holds any other licenses under this Ordinance and, if so, the names and locations of such other licensed establishments;

(6) the single classification of license for which the applicant is filing;

(7) the location of the proposed establishment, including a legal description of the property site, and a legal street address;

(8) the names of the employees for the proposed establishment, if known, or, if presently unknown a statement to that effect;

(9) the applicant's mailing address; and

(10) a site plan drawn to appropriate scale of the proposed establishment, including, but not limited to; (A) all property lines, right-of-way, and the location of the buildings, parking areas and spaces, curb cuts, and driveways; (B) all windows, doors, entrances and exits, fixed structural features, walls, stages, partitions, projection booths, admission booths, adult booths, concession booths, stands, counters and similar

structures; (C) all proposed improvements or enlargements to be made, which shall be indicated and calculated in terms of percentage of increase in floor size.

(c) *Application Fee.* Each application shall be accompanied by a non-refundable fee of Two Hundred Dollars ($200.00). If the application for a license is approved and a license is granted, the fee shall be applied as a credit towards the annual license fee required for the first year pursuant to Section 2-7 of this Ordinance.

(d) *Rejection of Incomplete Application.* In the event the County Administrator determines or learns at any time that the applicant has not properly completed the application for a proposed establishment, he shall promptly notify the applicant of such fact and shall automatically reject the application.

(e) *Consent.* By applying for a license under this Ordinance, the applicant shall be deemed to have consented to the provisions of this Ordinance and to the exercise by the County Administrator and the Departments of their respective responsibilities under this Ordinance.

Section 2-4. Investigation of Application.

(a) Upon receipt of the application properly filed with the County Administrator and upon payment of the non-refundable application fee, the County Administrator shall immediately stamp the application as received and shall immediately thereafter send photocopies of the application to the Sheriff, the Department of Development Services, Fire Prevention, and the Health Department. Each department shall promptly conduct an investigation of the applicant, application and the proposed

establishment in accordance with its responsibilities summarized in Section 2-1 of this Ordinance. At the conclusion of its investigation, each department shall indicate on the photocopy of the application its approval or disapproval of the application, date it, sign it, and, in the event it disapproves, it shall so state its reasons.

(b) A Department shall disapprove of an application if it finds that the proposed establishment will be in violation of any provision of this Ordinance or of any building, fire, health, or zoning statute, code, ordinance, or regulation. After its indication of approval or disapproval, each department shall immediately return the photocopy of the application to the County Administrator.

Section 2-5. Grant; Denial.

(a) *Time Period for Granting or Denying License.*

(1) The County Administrator shall grant or deny an application for an adult dancing establishment within forty-five (45) days from the date of its proper filing. Upon the expiration of the forty-five (45) day period the applicant may be permitted to begin operating the establishment for which a license is sought, unless and until the County Administrator notifies the applicant of a denial of the application and states the reason(s) for the denial.

(2) The County Administrator shall grant or deny an application for an adult bookstore or adult theater within fourteen (14) days from the date of proper filing. Upon the expiration of the fourteenth (14th) day, the applicant may be permitted to begin operating the establishment for which a license is sought, unless

and until the County Administrator notifies the applicant of a denial of the application and states the reason(s) for that denial.

(b) *Granting of Application for License.* If each of the departments has approved of the application, the County Administrator shall grant the application, notify the applicant of the granting, and issue the license to the applicant upon payment of the appropriate annual license fee as provided in Section 2-6 and 2-7, with credit as provided in Section 2-3(c).

(c) *Denying of Application for License.*

(1) The County Administrator shall deny the application for any of the following reasons:

(A) any of the Departments, excluding the Sheriff, has disapproved of the application;

(B) the application contains material false information;

(C) the applicant or any of the other individuals listed pursuant to Section 2-3(b)(1) has a license under this Ordinance which has been suspended or revoked;

(D) the granting of the application would violate a statute or ordinance or an order from a court of law which effectively prohibits the applicant from obtaining an adult entertainment establishment license.

(2) If the County Administrator denies the application, he shall notify the applicant of the denial, and state the reason(s) for the denial.

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(3) If a person applies for a license at a particular location within a period of nine (9) months from the date of denial of a previous application for a license at the location, and there has not been an intervening change in the circumstances which will probably lead to a different decision regarding the former reason(s) for denial, the application shall be rejected.

Section 2-6. Contents of License; Terms of License; Renewals; Expiration; cancellation.

(a) *Contents.* An adult entertainment license shall state on its face the name of the licensee, the name of the establishment, the street address of the establishment, the classification(s) of the license, the date of issuance, and the date of expiration.

(b) *Terms.* All licenses issued under this Ordinance shall be annual licenses which shall commence running on October 1, on which date they shall have been paid for, and shall expire on September 30 of the following year. If a license is issued after October 1, but by March 31 of the following year, the applicant shall pay the appropriate license fee. If a license is issued after March 31, but by October 1 of the same year, the applicant shall pay one-half the appropriate license fee.

(c) *Renewals.* Licenses shall be renewed annually. Subject to other provisions of this Ordinance, a licensee under this Ordinance shall be entitled to a renewal of his annual license from year to year, as a matter of course, by October 1 by presenting the license for the previous year and by paying the appropriate license fee.

(d) *Expiration.* A license that is not renewed under this Ordinance by October 1 of each year shall expire. An expired

license may be renewed by November 30 of the same year upon presentation of an affidavit stating that no adult entertainment activity has taken place at the establishment subsequent to expiration, upon payment of the appropriate license fee, and upon payment of a penalty of ten percent (10%) of the appropriate license fee for the month of October, or fraction thereof, and an additional penalty of five percent (5%) of the appropriate license fee for the month of November, or fraction thereof.

(e) *Cancellation.* All expired licenses not renewed by November 30 shall be canceled summarily by the County Administrator.

Section 2-7. Annual License Fees; Levy of; Regulatory in Nature.

(a) *Levy of License Fees.* There are hereby levied the following annual license fees under this Ordinance for an adult entertainment establishment;

(1) an establishment having a license for only an adult bookstore — seven hundred fifty dollars ($750.00); .

(2) an establishment having a license for only an adult theater, as follows:

(A) having only adult booths thirty-five dollars ($35.00) for each booth; or

(B) having only a hall or auditorium three dollars and fifty cents ($3.50) for each seat; or

(C) having only an area outdoors designed to

permit viewing by customers seated in vehicles —three dollars and fifty cents ($3.50) for each parking space; or

(D) having a combination of (A), (B), and/or (C) — the cumulative license fee applicable to each under (A), (B) and (C);

(E) adult motel — seven hundred fifty dollars ($750.00);

(3) an establishment having a license for only an adult dancing establishment — seven hundred fifty dollars ($750.00);

(4) an establishment having a license for two classifications — eight hundred dollars ($800.00);

(5) an establishment having a license for three classifications — nine hundred dollars ($900.00).

(b) *License Fees are Regulatory in Nature.* The annual license fees collected under this Ordinance are declared to be regulatory fees which are collected for the purpose of examination and inspection of adult entertainment establishments under this Ordinance and the administration thereof. The regulatory fees are in addition to and not in lieu of the occupational license taxes imposed by other Ordinances of Citrus County, Florida.

Section 2-8. Records and Reports; Consent by Licensee.

(a) *Records and Reports.* Each licensee shall keep such records and make such reports as may be required by the County Administrator and the Departments to implement this Ordinance and to carry out its purpose.

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(b) *Consent.* By holding a license under this Ordinance, the licensee shall be deemed to have consented to the provisions of this Ordinance and to the exercise by the County Administrator and the Departments of their respective responsibilities under this Ordinance.

Section 2-9. Transfer of License.

(a) *Requirements for Transfer.* A licensee shall not transfer his license to another person, and thereby surrender possession, control, and operation of the licensed establishment to such other person, unless and until such other person satisfies the following requirements:

(1) obtains an amendment to the license from the Ordinance which provides that he is now the licensee, which amendment may be obtained only if he has completed and properly filed an application with the County Administrator setting forth the information called for under Section 2-3(b)(1)-(5), and (9), and the application has been granted by the County Administrator after approval by the Sheriff's Department; and

(2) in the event he has purchased the licensed establishment from the licensee, adduces satisfactory proof that the sale was bona fide; and

(3) pays a transfer fee of ten percent (10%) of the appropriate annual license fee.

(b) *Effect of Suspension or Revocation Procedures.* No license may be transferred pursuant to subsection (a) when the County Administrator has notified the licensee that suspension of revocation proceedings have been or will be brought against the licensee.

(c) *No Transfer to Different Location.* A licensee shall not transfer his license to another location.

(d) *Attempted Improper Transfer Void; License Abandoned.* Any attempted transfer of a license either directly or indirectly in violation of this Section is hereby declared void, and the license shall be deemed abandoned and shall revert to the County Administrator.

Section 2-10. Changing Name of Establishment.

No licensee may change the name of an adult entertainment establishment unless and until he satisfies each of the following requirements.

(a) gives the County Administrator thirty (30) days notice in writing of the proposed name change;

(b) pays the County Administrator a three dollar ($3.00) change-of-name fee; and

(c) complies with Section 865.09, Florida Statutes (1985).

Section 2-11. Suspension of License.

(a) *Violation of a Building, Fire, Health, or Zoning Statute, Code, Ordinance or Regulation.* In the event a Department learns or finds upon sufficient cause that a licensed adult entertainment establishment is operating in violation of a building, fire, health, or zoning statute, code, ordinance or regulation, whether federal, state of local, contrary to the respective general requirements of Section 4-1(a),(b),(c), or (d), the Department shall promptly notify the licensee of the violation and shall allow the licensee a

seven (7) day period in which to correct the violation. If the licensee fails to correct the violation before the expiration of the seven (7) day period the Department shall notify the County Administrator, who shall forthwith suspend the license, and shall notify the licensee of the suspension. The suspension shall remain in effect until the Department notifies the County Administrator in writing that the violation of the provision in question has been corrected.

(b) *Illegal Transfer.* In the event the County Administrator learns or finds upon sufficient cause that a licensee engaged in a license transfer contrary to Section 2-9, he shall forthwith suspend the license, and notify the licensee of the suspension. The suspension shall remain in effect until the County Administrator is satisfied that the requirements of Section 2-9(a) have been met.

(c) *Convictions for Violations of SECTION 5 of this Ordinance.*

(1) In the event three (3) or more violation of SECTION 5 of this Ordinance occur at an adult entertainment establishment within a two (2) year period, and convictions result from at least three (3) of the violations, the County Administrator shall, upon the date of the third conviction, suspend the license, and notify the licensee of the suspension. The suspension shall remain in effect for a period of thirty (30) days.

(2) In the event one (1) or more violations of SECTION 5 of this Ordinance occur at the establishment within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for thirty (30) days under subsection (c)(1), but not including any

time during which the license was suspended for thirty (30) days, and a conviction results from one (1) or more of the violations, the County Administrator shall, upon the date of the first conviction, suspend the license again, and notify the licensee of the suspension. The suspension shall remain in effect for a period of ninety (90) days.

(3) In the event one (1) or more violations of SECTION 5 of this Ordinance occur within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for ninety (90) days under subsection (c)(2), but not including any time during which the license was suspended for ninety (90) days, and a conviction results from one (1) or more of the violations, the County Administrator shall, upon the date of the first conviction, suspend the license again, and notify the licensee of the suspension. The suspension shall remain in effect for a period of one hundred eighty (180) days.

(4) The transfer of renewal of a license pursuant to this Ordinance shall not defeat the terms of subsection (c)(1)-(3).

(d) *Effective Date of Suspension.* All periods of suspension shall begin sixteen (16) days after the date the County Administrator mails the notice of suspension to the licensee or on the date the licensee delivers his license to the County Administrator, whichever occurs first.

Section 2-12. Revocation of License.

(a) *False Information..* In the event the County Administrator learns or finds upon sufficient cause that a license was granted based upon false information, misrepresentation of

fact, or mistake of fact, he shall forthwith revoke the license, and notify the licensee of the revocation.

(b) *Convictions for Violation of SECTION 5 of this Ordinance.*

(1) In the event one (1) or more violations of SECTION 5 of this Ordinance occur at an adult entertainment establishment which has had a license suspended for a period of one hundred eighty (180) days pursuant to Section 2-9(c)(3), and the violation(s) occur within a period of two (2) years from the date of the violation from which the conviction resulted for which the license was suspended for one hundred eighty (180) days, but not including any time during which the license was suspended for one hundred eighty (180) days, the County Administrator shall forthwith revoke the license, and notify the licensee of the revocation.

(2) The transfer or renewal of a license pursuant to this Ordinance shall not defeat the terms of subsection (b)(1).

(c) *Effect of Revocation.* If a license is revoked, the licensee shall not be allowed to obtain another adult entertainment license for a period of ten (10) years and no license shall be issued again to any other person for the location upon which the adult entertainment establishment was situated.

(d) *Effective Date of Revocation.* The revocation shall take effect sixteen (16) days after the date the County Administrator mails the notice of revocation to the licensee or on the date the licensee delivers his license to the County Administrator, whichever happens first.

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SECTION 3. PERMITTING PROVISIONS

Section 3-1. Adult Entertainment Permit Required.

(a) Subject to subsection (b), no individual may work in an adult entertainment establishment without having applied for and having been granted a temporary or permanent adult entertainment permit from the County Administrator under this Ordinance.

(b) An individual who is to engage exclusively in performing janitorial or maintenance services at an adult entertainment establishment, or an individual who is to engage exclusively in performing barbering or cosmetology pursuant to a license issued under, respectively, Chapters 476 or 477, Florida Statutes (1985), is exempt from subsection (a).

Section 3-2. Application Requirement for Adult Entertainment Permit; Contents of; Application Fee; Rejection of Incomplete Application; Consent by Applicant.

(a) *Required.* Any individual desiring to work in an adult entertainment establishment shall file with the County Administrator a sworn permit application on a standard application form supplied by the County Administrator.

(b) *Contents of Application.* The completed application shall contain the following information and shall be accompanied by the following documents:

(1) The applicant shall state his legal name and any aliases;

(2) The applicant shall submit satisfactory proof that he is at least eighteen (18) years of age, and a photocopy of such proof shall be retained by the County Administrator;

(3) The applicant shall furnish a set of his fingerprints which have been taken by the Sheriff;

(4) The applicant shall present a recent color photograph of himself which has been taken by the County Administrator;

(5) The applicant shall state his mailing address and, if different, his address of residence;

(6) The applicant shall reveal his driver's license number;

(7) The applicant shall state whether he has, within the ten (10) year period immediately proceding the date of the application, been convicted of a specified criminal act, and if so, the specified criminal act involved, the date of conviction, and the place of conviction;

(8) The applicant shall indicate whether he or she has had a previous permit under this Ordinance which has been suspended or revoked, and, if so, the date of the suspension or revocation;

(9) Any additional information which the County Administrator deems necessary to effectuate the language and purpose of this Ordinance.

(c) *Application Fee.* Each application for a permit shall be

accompanied by a non-refundable fee of fifty dollars ($50.00). If the application for a permit is approved and a permit is granted, the fee shall be applied as a credit towards the permit fee required pursuant to Section 2-7 of this Ordinance.

(d) *Rejection of Incomplete Application.* In the event the County Administrator determines or learns at any time the applicant has not properly completed the application for a permit, he shall promptly notify the applicant of such fact, and shall automatically reject the application.

(e) *Consent.* By applying for a permit under this Ordinance, the applicant shall be deemed to have consented to the provisions of this Ordinance and to the exercise by the County Administrator, the Sheriff and, if applicable, the Health Department, of their respective responsibilities under this Ordinance.

Section 3-3. Temporary Permit. The County Administrator shall issue a temporary permit to an applicant on the date that the applicant properly files an application. The temporary permit shall automatically expire after fourteen (14) days.

Section 3-4. Investigation of Application. Upon receipt of an application properly filed with the County Administrator and upon payment of the non-refundable application fee, the County Administrator shall immediately stamp the application as received and shall immediately thereafter send a fingerprint card to the Sheriff, and, if the applicant has indicated an intention to work in an adult dancing establishment, notify the Health Department of the applicant's name and address. The County Administrator, and, if applicable, the Health Department, shall promptly conduct an investigation of the applicant in accordance

with their respective responsibilities under Section 2-1 of this Ordinance.

Section 3-5. Grant; Denial.

(a) *Time Period for Granting or Denying Permit.* The County Administrator shall grant or deny any application within fourteen (14) days from the date of its proper filing.

(b) *Granting of Permit.* If the Sheriff, the County Administrator, and, if applicable, the Health Department, have each approved of the application, the County Administrator shall grant the application, notify the applicant of the granting, and issue a permit to the applicant.

(c) *Denying of Permit.*

(1) The County Administrator shall deny the application for any of the following reasons:

(A) the applicant is less than eighteen (18) years of age;

(B) the application contains material false information;

(C) the applicant has had a previous permit under this Ordinance which has been suspended or revoked; or

(D) the granting of the application would violate a statute or ordinance or an order from a court of law which prohibits the applicant from obtaining an adult entertainment permit.

(2) If the County Administrator denies the application, it shall notify the applicant of the denial, and state the reason(s) for the denial.

Section 3-6. Contents of Permit; Scope; Term of Permit; Renewals; Expiration; Cancellation.

(a) *Contents.* The permit shall contain the following:

(1) The permitee's legal name and any aliases;

(2) The permitee's residential address;

(3) The permitee's sex;

(4) The permittee's birth date;

(5) The permittee's signature;

(6) The color photograph of the permittee which was taken by the County Administrator;

(7) The expiration date of the permit; and

(8) The signature of the County Administrator.

(b) *Scope.* The permit shall entitle the permittee to work in any adult entertainment establishment.

(c) *Term.* All permits issued under this Ordinance shall remain valid for two (2) years from the date of issuance.

(d) *Renewal.* Permits shall be renewed on or before two

(2) years from the date of issuance. A permittee shall be entitled to a renewal of his or her permit, as a matter of course, upon payment of a fifty dollar ($50.00) fee.

(e) *Expiration.* A permit that is not renewed on or before two (2) years from the date of issuance shall expire. An expired permit may be renewed within thirty (30) days upon presentment of an affidavit by the permittee stating that he has not engaged in any work at any adult entertainment establishment subsequent to expiration, upon payment of the permit fee of fifty dollars ($50.00), and upon payment of a penalty fee of ten dollars ($10.00).

(f) *Cancellation.* All expired permits not renewed within thirty (30) days shall be canceled summarily by the County Administrator.

Section 3-7. Permit Fee.

The fee for a permit under this Ordinance shall be fifty dollars ($50.00).

Section 3-8. Suspension of Permit.

(a) *Conviction for Violation of SECTION 5 of this Ordinance.* In the event a permittee commits one (1) or more violations of SECTION 5 of this Ordinance, and a conviction results from at least one (1) of the violations, the County Administrator shall, upon the date of the conviction, suspend the permit, and notify the permittee of the suspension. The suspension shall remain in effect for a period of ninety (90) days.

(b) *Effective Date of Suspension.* The period of suspension

shall begin sixteen (16) days after the date the County Administrator mails the notice of suspension to the permittee or on the date the permittee delivers his permit to the County Administrator, whichever happens first.

Section 3-9. Revocation of Permit.

(a) *Conviction for Violation of this Ordinance.* In the event a permittee commits one (1) or more violations of SECTION 5 of this Ordinance within a period of two (2) years from the date of the violation from which the conviction resulted for which the permit was suspended under Section 3-8, but not including any time during which the permit was suspended, and a conviction results from one (1) or more of the violations, the County Administrator shall, upon the date of the first conviction, revoke the permit, and notify the permitee of the revocation.

(b) *Effect of Revocation.* If a permit is revoked, the permittee shall not be allowed to obtain another adult entertainment permit for a period of five (5) years.

(c) *Effective Date of Revocation.* The revocation shall take effect sixteen (16) days after the date the County Administrator mails the notice of revocation to the permittee or on the date the permittee delivers his license to the County Administrator, whichever happens first.

SECTION 4. PROVISIONS FOR ADULT ENTERTAINMENT ESTABLISHMENTS

Section 4-1. General Requirements.

Each adult entertainment establishment shall, regardless of

whether it is licensed, observe the following general requirements:

(a) conform to all applicable building statutes, codes, ordinances, and regulations, whether federal, state or local;

(b) conform to all applicable fire statutes, codes, ordinances, and regulations, whether federal, state or local;

(c) conform to all applicable health statutes, codes, ordinances, and regulations, whether federal, state or local;

(d) conform to all applicable zoning regulations and land use laws, whether state or local;

(e) keep the adult entertainment license posted in a conspicuous place at the establishment at all times, which license shall be available for inspection upon request at all times by the public;

(f) opaquely cover each non-opaque area through which a person outside the establishment may otherwise see inside the establishment;

(g) on the first Monday of every month provide the County Administrator with a listing of all persons who are, or have been employees at the establishment since the first Monday of the previous month, and their positions.

Section 4-2. Adult Theater.

In addition to the general requirements for an adult entertainment establishment contained in Section 4-1, an adult

theater shall, regardless of whether it is licensed, observe the following special requirements:

(a) If the adult theater contains a hall or auditorium area, the area shall comply with each of the following provisions:

(1) have individual, separate seats, not couches, benches, or the like, to accommodate the maximum number of persons who may occupy the area;

(2) have a continuous main aisle alongside of the seating areas in order that each person seated in the areas shall be visible from the aisle at all times; and

(3) have a sign, posted in a conspicuous place at or near each entranceway to the hall or auditorium area which lists the maximum number of persons who may occupy the hall or auditorium area, which number shall not exceed the number of seats within the hall or auditorium area.

(b) If the adult theater contains adult booths, each adult booth shall comply with each of the following provisions:

(1) have a sign posted in a conspicuous place at or near the entranceway which states the maximum number of persons who may occupy the booth, which number shall correlate with the number of seats in the booth;

(2) have a permanently open entranceway not less than two (2) feet wide and not less than six (6) feet high, not capable of being closed or partially closed by any curtain, door, or other partition which would be capable of wholly or partially obscuring any person situated in the booth;

(3) have individual, separate seats, not couches, benches, or the like, which correlate with the maximum number of persons who may occupy the booth;

(4) have a continuous main aisle alongside the booth in order that each person situated in the booth shall be visible from the aisle at all times; and

(5) have, except for the entranceway, walls or partitions of solid construction without any holes or openings in such walls or partitions.

(c) If the adult theater is designed to permit outdoor viewing by persons seated in automobiles, it shall have the motion picture screen so situated, or the perimeter of the establishment so fenced, that the material to be seen by those persons may not be seen from any public right-of-way, property zoned for residential use, religious institution, educational institution, or park.

Section 4-3. Adult Dancing Establishment.

In addition to the general requirements for an adult entertainment establishment contained in Section 4-1, an adult dancing establishment shall, regardless of whether it is licensed, observe the following special requirements:

(a) it shall have a stage provided for the display or exposure of any specified anatomical area by an employee to a person other than another employee consisting of a permanent platform (or other similar permanent structure) raised a minimum of eighteen (18) inches above the surrounding floor and encompassing an area of at least one hundred (100) square feet; and

(b) any area in which a private performance occurs shall:

(1) have a permanently open entranceway not less than two (2) feet wide and not less than six (6) feet high, which entranceway is not capable of being closed or partially closed by any curtain, door, or other partition which would be capable of wholly or partially obscuring any person situated in the area; and

(2) have a wall-to-wall, floor-to-ceiling partition of solid construction without any holes or openings, which partition may be completely or partially transparent, and which partition separates the employee from the person viewing the display.

SECTION 5. CRIMINAL PROVISIONS

Section 5-1. Operation of Establishment Without Valid Adult Entertainment License.

It shall be unlawful for any person to be an operator of an adult entertainment establishment where the person knows or should know:

(a) that the establishment does not have an adult entertainment license for any applicable classification;

(b) that the establishment has a license which is under suspension;

(c) that the establishment has a license which has been revoked or canceled; or

(d) that the establishment has a license which has expired.

Appendix H

Section 5-2. Operation of Establishment Contrary to Certain Requirements.

(a) It shall be unlawful for any person to be an operator of an adult entertainment establishment which does not satisfy all of the general requirements of Section 4-1.

(b) It shall be unlawful for any person to be an operator of an adult theater which does not satisfy all of the special requirements of Section 4-2.

(c) It shall be unlawful for any person to be an operator of an adult dancing establishment which does not satisfy all of the special requirements of Section 4-3.

Section 5-3. Allowing Employee to Engage in Prohibited Acts.

It shall be unlawful for an operator of an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, to knowingly or with reason to know, permit, suffer, or allow any employee:

(a) to engage in a straddle dance with a person at the establishment;

(b) to contract or otherwise agree with a person to engage in a straddle dance with a person at the establishment;

(c) to engage in any specified sexual activity at the establishment;

(d) to, where alcoholic beverages are sold, offered for sale,

or consumed, display or expose at the establishment less than completely and opaquely covered human genitals or pubic region, less than completely and opaquely covered cleavage of the human buttocks, less than completely and opaquely covered areola and nipple of the human female breast, or human male genitals in a discernibly turgid state, even if completely and opaquely covered;

(e) to display or expose at the establishment less than completely and opaquely covered human genitals or pubic region, less than completely and opaquely covered cleavage of the human buttocks, less than completely and opaquely covered areola and nipple of the human female breast, or human male genitals in a discernibly turgid state, even if completely and opaquely covered, unless such employee is continuously positioned away from any person other than another employee, and unless such employee is in an area as described in Section 4.3.

(f) to display or expose any specified anatomical area while simulating any specified sexual activity with any other person at the establishment, including with another employee;

(g) to engage in a private performance unless such employee is in an area which complies with the special requirements of Section 4-3(b)(1) and (b)(2);

(h) to, while engaged in the display or exposure of any specified anatomical area, intentionally touch any person at the adult entertainment establishment, excluding another employee;

(i) to intentionally touch the clothed or unclothed body of any person at the adult entertainment establishment, excluding

another employee, at any point below the waist and above the knee of the person, or to intentionally touch the clothed or unclothed breast of any female person; or

(j) subject to Section 3-1(b), to work who has not applied for and obtained a permit under this Ordinance.

Section 5-4. Advertising Prohibited Activity.

It shall be unlawful for an operator of an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, to advertise the presentation of any activity prohibited by any applicable state statute or local ordinance.

Section 5-5. Minors Prohibited.

It shall be unlawful for an operator of an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, to knowingly, or with reason to know, permit, suffer, or allow:

(a) admittance to the establishment of a person under eighteen (18) years of age;

(b) a person under eighteen (18) years of age to remain at the establishment;

(c) a person under eighteen (18) years of age to purchase goods or services at the establishment; or

(d) a person to work at the establishment as an employee who is under eighteen (18) years of age.

Appendix H

Section 5-6. Working at Establishment Which Does Not Have Valid Adult Entertainment License.

It shall be unlawful for any person to work in an adult entertainment establishment that he knows or should know is not licensed under this Ordinance, or which has a license which is under suspension, has been revoked or canceled, or has expired, regardless of whether he has applied for and obtained a temporary or permanent permit under this Ordinance.

Section 5-7. Working Without Permit Prohibited.

(a) Subject to Section 3-1(b), it shall be unlawful for any person to work in an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, if the person has not applied for and obtained a temporary or permanent permit under this Ordinance.

(b) Subject to Section 3-1(b), it shall be unlawful for any person to work in an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, unless the person has a temporary or permanent permit in his possession while working at the establishment.

(c) Subject to Section 3-1(b), it shall be unlawful for any person working in an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, to fail to produce a temporary or permanent permit upon demand for inspection by any law enforcement officer.

Section 5-8. Engaging in Prohibited Activity.

It shall be unlawful for any employee of an adult

entertainment establishment, regardless of whether it is licensed under this Ordinance:

(a) to engage in a straddle dance with a person at the establishment;

(b) to contract or otherwise agree with a person to engage in a straddle dance with a person at the establishment;

(c) to engage in any specified sexual activity at the establishment;

(d) to, where the employee knows or should know that alcoholic beverages are sold, offered for sale, or consumed, display or expose at the establishment less than completely and opaquely covered human genitals or pubic region, less than completely and opaquely covered cleavage of the human buttocks, less than completely and opaquely covered areola and nipple of the human female breast, or human male genitals in a discernibly turgid state, even if completely and opaquely covered;

(e) to display or expose at the establishment less than completely and opaquely covered human genitals or pubic region, less than completely and opaquely covered cleavage of the human buttocks, less than completely and opaquely covered areola and nipple of the human female breast, or human male genitals in a discernibly turgid state, even if completely and opaquely covered, unless such employee is continuously positioned away from any person other than another employee, and unless such employee is in an area as described in Section 4-3(a);

(f) to engage in the display or exposure of any specified anatomical area while simulating any specified sexual activity with any other person at the establishment, including with another employee;

(g) to engage in a private performance unless such employee is in an area which complies with the special requirements set forth at 4-3(b)(1) and (b)(2);

(h) to, while engaged in the display or exposure of any specified anatomical area, intentionally touch any person at the adult entertainment establishment, excluding another employee; or

(i) to touch the clothed or unclothed body of any person at the adult entertainment establishment, excluding another employee, at any point below the waist and above the knee of the person, or to touch the clothed or unclothed breast of any female person.

Section 5-9. Touching of Employee by Person.

(a) It shall be unlawful for any person in an adult entertainment establishment, other than another employee, to intentionally touch an employee who is displaying or exposing any specified anatomical area at the adult entertainment establishment.

(b) It shall be unlawful for any person in an adult entertainment establishment, other than another employee, to intentionally touch the clothed or unclothed breast of any employee, or to touch the clothed body of any employee at any point below the waist and above the knee of the employee.

Appendix H

Section 5-10. Exceeding Occupancy Limit of Adult Booth.

It shall be unlawful for any person to occupy an adult booth in which booth there are more people than that specified on the posted sign required by Section 4-2.

Section 5-11. Use of Restrooms or Dressing Rooms.

Notwithstanding any provision indicating to the contrary, it shall not be unlawful for any employee of an adult entertainment establishment, regardless of whether it is licensed under this Ordinance, to expose any specified anatomical area during the employee's bona fide use of a restroom, or during the employee's bona fide use of a dressing room which is accessible only to employees.

Section 5-12. Hours of Operation.

(a) It shall be unlawful for any operator of an adult entertainment establishment to allow such establishment to remain open for business, or to permit any employee to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of 2:00 a.m. and 9:00 a.m. of any particular day.

(b) It shall be unlawful for any employee of an adult entertainment establishment to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of 2:00 a.m. and 9:00 a.m. of any particular day.

Section 5-13. Alteration of License or Permit.

(a) It shall be unlawful for any person to alter or otherwise

change the contents of an adult entertainment license without the written permission of the County Administrator.

(b) It shall be unlawful for any person to alter or otherwise change the contents of an adult entertainment permit without the written permission of the County Administrator.

Section 5-14. False Statement or False Information in Applying for License or Permit.

(a) It shall be unlawful for any person applying for an adult entertainment license to make a false statement which is intended to facilitate the issuance of a license, or to provide false information which is intended to facilitate the issuance of a license.

(b) It shall be unlawful for any person applying for an adult entertainment permit to make a false statement which is intended to facilitate the issuance of a permit, or to provide false information which is intended to facilitate the issuance of a permit.

Section 5-15. Violations Subject to Criminal Prosecution.

Whoever violates any Section of SECTION 5 of this Ordinance may be prosecuted and punished as provided by Section 125.69, Florida Statutes (1985).

SECTION 6. MISCELLANEOUS PROVISIONS

Section 6-1. Appeals.

(1) Within fifteen (15) days of the mailing of a notice of

denial of an application for a license or permit or a notice of suspension or revocation of a license or permit, the aggrieved party may file a notice of appeal with the Board.

(2) The notice of appeal shall be filed with the Clerk of the Board. The notice of appeal shall be accompanied by payment of a filing fee of fifty dollars ($50.00) to cover administrative costs. Upon receipt of the notice of appeal and upon payment of the accompanying fifty dollars ($50.00) filing fee, the Clerk shall schedule a hearing for as soon as the Board's calendar will allow. The Clerk shall provide the appellant with at least ten (10) days' notice of the time and place for the hearing.

(3) If, at the conclusion of the hearing, the Board finds that the license or permit should not have been denied, suspended, revoked, or canceled, it shall so notify the County Administrator, who shall immediately grant or reissue the license or permit.

Section 6-2. Notice.

Any notice required under this Ordinance shall be accomplished by sending a written notification by certified mail to the mailing address set forth on the application for the license or a permit. This mailing address shall be considered the correct mailing address unless the County Administrator has been otherwise notified in writing.

Section 6-3. Immunity from Prosecution.

The County or any Department shall be immune from prosecution, civil or criminal, for reasonable, good-faith trespass upon an adult entertainment establishment while acting within the scope of its authority under this Ordinance.

Appendix H

Section 6-4. Powers of Board.

The Board may bring suit in the Circuit Court to restrain, enjoin or otherwise prevent the violation of this Ordinance.

Section 6-5. Emergency Adoption and Effective Date

The Board finds that it is necessary, in order to protect the health, safety and welfare of the citizens of Citrus County, that this Ordinance become effective immediately upon its adoption. The effective date of this Ordinance shall be when a certified copy of the Ordinance has been accepted by the postal authorities of the U.S. Government for special delivery by registered mail to the Department of State.

DONE AND ADOPTED this 25th day of March, 1988.

BOARD OF COUNTY COMMISSIONERS
OF CITRUS COUNTY, FLORIDA

BY: /s/ Nick Bryant
NICK BRYANT, CHAIRMAN

ATTEST:

/s/ Walt Connors
WALT CONNORS, CLERK

APPROVED AS TO FORM
AND CORRECTNESS:

/s/ James A. Neal, Jr.
JAMES A. NEAL, JR.
ASSISTANT COUNTY ATTORNEY

Supreme Court, U.S.
FILED
MAR 27 1995
OFFICE OF THE CLERK

No. 94-1427

In The
Supreme Court of the United States

October Term, 1994

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Petitioner,

vs.

JOSEPH RICHARD REDNER and
ROBERT BUTTERWORTH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LUKE CHARLES LIROT
2000 Magnolia Drive
Clearwater, Florida 34624
(813) 874-2030
Counsel for Respondent Redner

QUESTIONS PRESENTED

1. Whether it is proper in assessing the constitutionality of an ordinance to initially consider the fourfold test of ***United States v. O'Brien*** and, if justifying same by the *O'Brien* test, to then evaluate the same ordinance for the existence of procedural safeguards as required by ***FW/PBS, Inc., v. City of Dallas***.

2. Whether there is any validity to the suggestion that there is any "discord" or "confusion" regarding the tests set forth in ***Barnes v. Glen Theatre, Inc.***, and ***FW/PBS, Inc., v. City of Dallas***, when there is, in fact, no conflict whatsoever between the decisions and no evidence of a lack of uniformity.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Petitioner, Charles S. Dean, as Sheriff of Citrus County, Florida, and the Respondents, Joseph Richard Redner, and Robert Butterworth, the Attorney General of the State of Florida.

There are no entities to report or list pursuant to Supreme Court Rule 29.1.

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No. 94-1427

In The

Supreme Court of the United States

October Term, 1994

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Petitioner,

vs.

JOSEPH RICHARD REDNER and
ROBERT BUTTERWORTH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Joseph Richard Redner, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Charles S. Dean, Sheriff of Citrus County, Florida.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals affirmed the ruling by the district court granting the petition for writ of habeas corpus to Respondent, Redner. That decision is reported at ***Redner v. Dean***, 29 F.3d 1495 (11th Cir. 1994). This decision is set out as Appendix "B" of the Petition. Following issuance of the Eleventh Circuit Opinion, the Petitioner moved for rehearing and suggestion for rehearing *en banc*. Both of which were denied on November 2, 1994. This denial is set out as Appendix "C" of the Petition.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law ... abridging the freedom of speech ...

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

ORDINANCES ENACTED BY CITRUS COUNTY, FLORIDA

Citrus County, Florida, Ordinance 88-05 is set out as Appendix "H" of the Petition.

STATEMENT OF THE CASE

In early March of 1988, Redner became interested in opening and operating an adult entertainment establishment in Homosassa Springs, an unincorporated community located in Citrus County, Florida. In this endeavor, Redner investigated all applicable Citrus County ordinances, rules, regulations and permitting requirements.

On the basis of this investigation, which included direct inquiries to Citrus County employees regarding any such restrictions which applied to the contemplated business, Redner determined properly that there were no regulatory obstacles in effect which would prevent him from opening an adult entertainment establishment at a specific premises.

On or about March 17, 1988, on the basis of this reliance, Redner entered into a lease for a contemplated premises for eighteen (18) months, thereby incurring an obligation of $36,000.00 for the term of the lease. At this point in time, Redner also undertook repairs and alterations to the premises at a cost of approximately $10,000.00.

In an effort to comply with requirements to open the business, the proper local agencies were contacted. On March 23, 1988, the premises was inspected by the Citrus County Public Health Unit for food service inspections and permits. A fire inspection was also conducted. The proper permits were issued on March 24, 1988. Also on that date, after Redner specifically described the proposed business to County officials in his attempt to get all proper licenses and permits, the Citrus County Tax Collector issued occupational licenses for "Dance Hall," "Entertainment Cafe," and one for "Merchandise Vending Machines" in preparation for the imminent opening of the business establishment. No specific occupational license designation existed at that time relating to adult entertainment facilities.

No attempt was made to hide the intended use of the leased premises from any Citrus County employee consulted, or from the public in general. As a result of this, it can only be presumed that communications among the employees and citizens of Citrus County fueled the attention which the anticipated opening of the establishment received during this period of time. The event was surrounded by extensive media attention. No other adult entertainment facility existed in Citrus County prior to Redner's endeavor.

On March 25, 1988, the date Redner had anticipated opening his establishment, and after Redner had spent substantial sums renovating the property for his anticipated use, acquired the proper occupational licenses required at the time he applied for them, and obtained the above referenced inspections, the Citrus County Board of County Commissioners met in emergency session and enacted Citrus County Ordinance 88-05, an

emergency ordinance establishing licensing requirements for adult entertainment establishments and their employees. The nature of any alleged "emergency" is unknown other than the anticipated opening of Redner's use. A copy of Ordinance 88-05 is set out as Appendix "H" to the Petition.

Emergency Ordinance 88-05 imposed the requirement that a license be obtained prior to the presentation of any constitutionally protected expression by any business deemed to be an adult use. This application required the submission of extensive information and lengthy investigation by several administrative and law enforcement agencies. While there was a time limit for the granting or denial of a license, the proposed licensee obtained no mandatory right to engage in protected expression at the expiration of the time limit and the provisions dealing with the appeal of any such denial contained no time limit whatsoever. The fee for any such license was $750.00.

The Ordinance also imposed similar requirements that any employee working at any adult use establishment similarly obtain an adult use permit to legally be employed at any such establishment. The application requirements were again extensive and the time limits for the granting or denial of any application for such a permit, while limited, had no such limitation on any appeal process of the denial of any permit. A fee of $50.00 was required with any permit.

Section 5 of the Ordinance established criminal penalties for any failure to comply with any provision of Citrus County Ordinance 88-05. No provision for judicial review appeared anywhere in emergency Ordinance 88-05. The only appeal of any state action occasioned by the Ordinance or wrongful denial of a license was to the Board of County Commissioners, the same

body with the ultimate responsibility for the administration of the Ordinance (Section 6-1), and the same body that would have rejected the license in the first place. There was no time limit or deadline for the scheduling of any appeal hearing whatsoever.

On March 29, 1988, Redner opened his establishment, and was arrested and charged with operating an adult entertainment establishment without a license. Redner has maintained that he did not do this in open defiance, but rather as a reaction to the alleged "bad faith" implied by the sequence of events surrounding the enactment of the Ordinance. Two subsequent attempts to open the establishment also resulted in arrest.

For Redner's first two arrests, bond was placed at $500.00. On March 31, 1988, when Redner was arrested the third time, bond was placed at $250,000.00. Only when Redner agreed he would not again engage in the presentation of the chosen protected expression unless either a Court Order or a License issued pursuant to Citrus County were obtained was his bond reduced and his release affected.

On May 24, 1988, the Citrus County Board of Commissioners met in a regular session and approved Ordinance 88-06, an Adult Entertainment Licensing Ordinance substantially similar to 88-05, but with provisions providing additional bases for license denial and other substantive provisions. Ordinance 88-06 superseded Ordinance 88-05, but both were identical for the purposes of this action. Redner filed separate challenges in the federal district court involving the original ordinance, 88-05, under which he was charged with violating, and its permanent

successor, Ordinance 88-06.[1]

Subsequent to this, Citrus County passed Ordinance 88-A51, an amendment to the Citrus County Zoning Ordinance, establishing zoning and locational restrictions for adult entertainment establishments in addition to the licensing restrictions contained in Ordinance 88-05 and Ordinance 88-06. These restrictions precluded the use of Redner's leased premises as an adult entertainment facility even though it was in a commercially zoned area and not close to any other sensitive zoning uses.

In the state criminal case, Redner was convicted on October 6, 1988 and was sentenced on October 17, 1988. Redner appealed the county court convictions to the Circuit Court for the Fifth Judicial Circuit of Florida, Case No. 88-499-CF. The state circuit court, in its appellate capacity, affirmed the convictions of the trial court and issued its Mandate on August 13, 1990.

Redner subsequently filed a petition for writ of certiorari with the appropriate Florida Fifth District Court of Appeal. The petition was denied on August 31, 1990. Redner then filed a motion for rehearing of said denial, which was itself denied on

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[1] Relying on the abstention doctrine set forth in ***Younger v. Harris,*** 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the district court abstained from deciding the merits of the attacks on both of the licensing ordinances. The court of appeals affirmed the abstention concerning the temporary licensing ordinance, 88-05, but reversed the abstention as to all of 88-06, remanding for consideration Respondents' same claims on that ordinance. ***Redner v. Citrus County, Florida,*** 919 F.2d 646 (11th Cir. 1990). The district court case (No. 88-50-Civ-Oc-10) is pending and the court has ordered that the case be reopened and actively prosecuted.

September 28, 1990, thereby exhausting Redner's state court remedies of the convictions and sentences at issue therein.

In May 1991, Redner was to begin serving the sentences for his state criminal convictions. He first sought a stay of sentence pending appeal under federal habeas corpus from the state county court, which was withdrawn on jurisdictional reasons. Redner was incarcerated *instanter* at the conclusion of the state court hearing. Subsequent to being incarcerated, Redner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The case was styled ***Redner vs. Dean,*** Case No. 91-90-Civ-Oc-14, U.S.D.C., Middle District of Florida.

On May 6, 1991, Redner filed an emergency motion for stay of state court sentence in federal court. That motion was denied on May 22, 1991. The district court then referred the petition to a magistrate judge and, on March 4, 1992, the magistrate judge issued a Report and Recommendation finding Citrus County Ordinance 88-05 unconstitutional. The magistrate judge found that the Ordinance failed to provide the procedural safeguards necessary for a system of prior restraint because it did not place specific time limits on the decision maker and did not provide for prompt judicial review.

The district court adopted and confirmed the magistrate judge's Report and Recommendation and granted Redner's petition for habeas corpus relief. The court further directed the two respondents in the habeas action, Florida Attorney General Robert Butterworth and Citrus County Sheriff Charles S. Dean, to set aside Redner's convictions, discharge him from any continued restraint, and directed both Respondents to pay Redner's costs.

On May 28, 1992, Florida Attorney General Butterworth made a motion in the habeas case under Rule 59(e), Federal Rules of Civil Procedure, to amend the civil judgment to place the responsibility for costs and for setting aside the conviction on Dean alone. The court granted the motion and, after some dispute regarding the timeliness of Dean's appeal, since a first appeal was filed prior to the determination of Butterworth's motion, and a subsequent appeal was filed after the court relieved Butterworth from the directives of the habeas order, the matter was appealed to the Eleventh Circuit which affirmed the district court in ***Redner v. Dean*** 29 F.3d 1495 (11th Cir. 1994). A copy of this Opinion is set out as Appendix "B" to the Petition. The Mandate issued November 15, 1994.

Petitioner Dean now petitions this Court for a writ of certiorari to review the decisions of the Court of Appeals. The Respondent, Joseph Richard Redner, herein files his Brief in Opposition, explaining to this Court the reasons the writ should be denied.

REASONS FOR DENYING THE WRIT

I. IT IS PROPER IN ASSESSING THE CONSTITUTIONALITY OF AN ORDINANCE TO INITIALLY CONSIDER THE FOURFOLD TEST OF *UNITED STATES V. O'BRIEN* AND, IF JUSTIFYING SAME BY THE *O'BRIEN* TEST, TO THEN EVALUATE THE SAME ORDINANCE FOR THE EXISTENCE OF PROCEDURAL SAFEGUARDS AS REQUIRED BY *FW/PBS, INC., V. CITY OF DALLAS.*

A. *Barnes v. Glen Theater* is irrelevant to the case at hand for the purposes of this petition.

In asserting his reasons for granting the writ, the Petitioner engages in a mystifying recitation of the *Barnes* case and seems to suggest that the circuit court in some way rejected *Barnes* or declined to apply the four part test from *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). This desperate attempt to create some basis to suggest "error" on the part of the circuit court is misleading and inaccurate.

The petition for writ of habeas corpus, which was granted by the district court and affirmed by the circuit court, was predicated on legal points and authorities that clearly recognized the underlying applicability of the First Amendment to local ordinances regulating "sexually oriented" businesses. In *Barnes v. Glen Theatre*, 111 S.Ct. 2456 (1991), the specific questions presented to this Court included: 1) whether nude bar room style "go-go" dancing was "speech" protected by the First Amendment, and 2) if nude bar room dancing was "speech," whether Indiana's general public indecency law was

unconstitutional as applied to such dancing. This Court, in a plurality decision, essentially concluded that adult entertainment exotic dancing, performed for entertainment, *was* expression protected by the First Amendment, even though marginally so. It was further held that under the Indiana statutory requirement, the dancers in the establishments involved in the ***Barnes*** case could be required to wear "pasties and g-strings," and that this was an incidental restriction which did not violate the First Amendment.

In attempting to confuse the First Amendment protections offered the expression presented by Respondent Redner, the Petitioner suggests that somehow Citrus County's Adult Entertainment Licensing Ordinance was not the restraint or censorship of expression, but was actually a regulation of activities that were more "conduct" or some type of commercial activity exempt from any regulatory scrutiny. In asserting this position, the Petitioner ignores years of precedent, clearly indicating that his argument is entirely void of merit. The Citrus County Ordinance, which was the source of the criminal convictions which were the basis of the petition for writ of *habeas corpus,* was not an attempt to require dancers to perform in less than a "nude state" (a la ***Barnes***). Contrary to the Petitioner's self-serving assertions, the Ordinance was, in actuality, the imposition of a licensing scheme, enacted on an "emergency" basis, that would pose a complete prior restraint to the presentation of any protected expression. Attempting to mischaracterize this municipal legislation in order to circumvent First Amendment protections is a deceptive practice that has historically and consistently been exposed and criticized by many courts, including this Honorable Court.

As clearly stated in the majority opinion authored by Justice Rehnquist, and joined in by Justices Kennedy and O'Connor in ***Barnes***:

> "Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), we said: '[A]lthough the customary barroom type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue, 409* U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.' In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), we said that '[furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation' (citations omitted). These statements support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." ***Id.***, at 4747.

Justice Souter, concurring in the judgment, stated:

> "Thus, I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of

First Amendment protection." ***Id.***, at 4751.

The most notable impact of the ***Barnes*** decision on the instant case is that it further solidifies the argument that the expression sought to be presented at the establishment Redner attempted to open in Citrus County was, and is, protected by the First Amendment. It also emphasizes the applicability of the ***O'Brien*** test in addressing the validity of the Citrus County Ordinance at issue. The ***Barnes*** case in no way detracts, either directly or indirectly, from the validity of the circuit court's application of the decision in ***FW/PBS v. City of Dallas***, 110 S.Ct. 596 (1990)[2] to the factual scenario experienced by Redner and properly recognized by both the district court and the circuit court as the authoritative test to evaluate the existence of procedural safeguards in legislation such as the Citrus County Ordinance.

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[2] In ***FW/PBS*** Justice O'Connor's plurality Opinion, joined by Justices Stevens and Kennedy, analyzed an adult entertainment licensing ordinance under ***Freedman v. Maryland***, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In ***Freedman***, the Supreme Court held that any system of censorship that runs the risk of suppressing constitutionally protected expression must contain three procedural safeguards designed to obviate the dangers of censorship: (1) the burden of going to court to suppress the speech and the burden of proof once in court must lie with the censor; (2) any restraint prior to a judicial determination may only be for a specified brief time period in order to preserve the status quo; and (3) an avenue for prompt judicial review of the censor's decision must be available. ***Id.*** At 58-59, 85 S.Ct. at 739. In her plurality opinion in ***FW/PBS***, Justice O'Connor found that the first of the ***Freedman*** procedural safeguards is not necessary in a licensing scheme regulating an entire business, as opposed to a scheme like that in ***Freedman*** involving the direct censorship of particular expressive material. Regardless of this fact, the exact same flaws in the ***FW/PBS*** ordinance are blatantly apparent in Citrus County Ordinance 88-05.

The practical result of ***Barnes*** is that it allows communities to enact legislation which impose "time, place or manner" regulations on nude dancers to require those modest decorations referred to by the Court as "pasties and g-strings," since this requirement is the "bare minimum necessary to achieve the state's purpose." This in no way affects the requirement that any such legislation affecting First Amendment activity, even if only marginally protected, must contain the procedural safeguards enumerated in ***FW/PBS v. City of Dallas***.

In addition to the misleading nature of the erroneous distinctions urged by the Petitioner to avoid a First Amendment based analysis, Dean's position conflicts with a long line of this Court's decisions which hold that laws requiring a license to engage in First Amendment activity must be subjected to much more exacting scrutiny than those which license non-expressive conduct. See e.g. ***Shuttlesworth v. City of Birmingham***, 394 U.S. 1417 (1969); ***Saia v. New York***, 334 U.S. 558 (1948); ***Lovell v. Griffin***, 303 U.S. 444 (1938); and ***Thornhill v. Alabama***, 310 U.S. 88 (1940). These cases recognize: (1) that the requirement of a license before one may engage in expression is the kind of prior restraint most hated by the Framers; and (2) such laws must be subjected to the most strict level of scrutiny to ensure against the possibility of censorship under the guise of regulation.

Perhaps the most troubling aspect of the Petitioner's argument is the implicit suggestion that the circuit court rejected or ignored ***Barnes*** or in some way was unaware of the import of the ***O'Brien*** test. This innuendo is entirely without merit, as revealed by the decision itself:

"While it enjoys some degree of First Amendment protection, however, nude dancing is not immune from governmental regulation. Even activity protected by the First Amendment can be regulated if the regulation furthers a substantial government interest and constitutes only an incidental limitation on the expressive activity. *See United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968). In *Barnes*, for instance, the Supreme Court found that an Indiana statute requiring dancers to wear pasties and G-strings was not an impermissible infringement on the dancers' rights of freedom of expression. 501 U.S. at 567-68, 111 S.Ct. At 2461. The present case differs from *Barnes* in at least one important respect. While *Barnes* involved some incidental limitations on the conduct associated with the expressive activity, the instant case presents a complete restraint of protected expression.

"The instant case is more analogous to another Supreme Court case, *FW/PBS, Inc. V. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). *FW/PBS* is the Supreme Court's most recent pronouncement on the prior restraint of nude dancing. Because it dealt with a licensing scheme similar to the Citrus County Ordinance, it provides us with valuable insight.
"In *FW/PBS*, the Supreme Court entertained a facial challenge to a Dallas licensing ordinance regulating sexually oriented business. Like the

> Citrus County Ordinance, the Dallas scheme regulated sexually oriented businesses with a system of zoning, licensing, and inspections...." ***Redner v. Dean,*** 29 F.3d 1495, at 1499, 1500 (11th Cir. 1994).

After going through a well-reasoned evaluation of Citrus County Ordinance 88-05, the circuit court came to the inescapable conclusion that the illusory time limits for processing a license application, the total lack of any time limit for an appeal of an erroneous license denial, and the total lack of any opportunity for prompt judicial review rendered Citrus County Ordinance 88-05 blatantly unconstitutional under the tests set forth in ***FW/PBS***.

The Respondent herein does not suggest that Citrus County cannot regulate the activity at issue herein. What he does emphatically submit is that such regulation must first satisfy the ***O'Brien*** test to justify its very existence. Once this is accomplished, then an appropriate analysis must be undertaken to find that the regulation of expressive activity is governed by the adequate procedural safeguards set forth in ***FW/PBS v. City of Dallas***. The circuit court appropriately undertook this sequence in evaluating the instant case and none of the arguments suggested by the Petitioner, confusing though they may be, in any way justify the relief requested from this Court.

B. Satisfaction of the *O'Brien* Test is irrelevant to the case at hand for the purposes of this petition.

In this portion of the Petitioner's arguments for granting the writ, a strong position is set forth in support of the contention

that Citrus County Ordinance 88-05 satisfies the ***O'Brien*** test. While this argument is well presented, it has absolutely no relevance to the case at hand because there was never any issue involving satisfaction of the ***O'Brien*** test. Since most of this material was covered in the previous section of the instant Brief in Opposition, not much additional argument in this regard is necessary. There are, however, some blatant misrepresentations that must be addressed. For example, the Petitioner suggests, "Once an application is properly filed and the establishment is in compliance with all applicable health, safety, and zoning requirements, the County Administrator must grant the license." (Petition at p. 12).

This contention is false and it was the illusory nature of any requirement to issue any license that the circuit court found to render Ordinance 88-05 unconstitutional under the procedural safeguard requirements of ***FW/PBS***. Specifically, the circuit court found that there was no absolute right to operate a First Amendment protected business at the expiration of the forty-five (45) day review period. In addition to this, a second provision of the Ordinance was also found to result in the indefinite suppression of expressive activity. In the event the Administrator denied any such license, an appeal would have to be taken before the Board (which was the very same body which denied the license in the first place). The Ordinance then directed the Clerk of the Board to "schedule a hearing for as soon as the Board's calendar would allow." These nebulous provisions clearly create an ample opportunity to either intentionally, or even negligently, impose an impermissible delay in the presentation of protected expressive activities.

The circuit court recognized that the failure to create an absolute right to engage in expressive activity, coupled with the possibility that protected expression could be restrained for an indefinite period of time prior to any form of judicial review, rendered the Ordinance invalid for failing to impose reasonable time limits on the decision maker as required by ***Freedman,*** *supra,* and ***FW/PBS***.

Finally, although the Petitioner does not really address this issue, the circuit court properly identified that the Citrus County Ordinance did not satisfy the facial requirement that there be the possibility of prompt judicial review in the event a license for engaging in expressive activity was erroneously denied. The circuit court properly identified the Respondent's challenge as a facial one and properly concluded that this additional procedural safeguard was also lacking in the Citrus County Ordinance.

Under any analysis, none of the distinctions suggested by the Petitioner, nor the attempt to create confusion or argue non-issues, should be persuasive to this Court. It is respectfully submitted that none of the arguments submitted by the Petitioner justify granting of the writ.

II. THERE IS NO VALIDITY TO THE SUGGESTION THAT THERE IS ANY "DISCORD" OR "CONFUSION" REGARDING THE TESTS SET FORTH IN *BARNES V. GLEN THEATRE, INC.*, AND *FW/PBS, INC., V. CITY OF DALLAS*, WHEN THERE IS, IN FACT, NO CONFLICT WHATSOEVER BETWEEN THE DECISIONS AND NO EVIDENCE OF A LACK OF UNIFORMITY

The Petitioner in this section again attempts to confuse this Court by suggesting that various courts of appeal are in conflict about the correct test to apply, "***O'Brien*** or ***FW/PBS,***" in determining the constitutionality of laws regulating adult entertainment establishments. Petitioner attempts to confuse the matter further by distinguishing between zoning ordinances, licensing ordinances, or prohibitions of all public nudity. As the Respondent will explain herein, there is absolutely no confusion, no conflict, and, if the parameters of an ordinance are evaluated properly, no discord whatsoever in applying the ***O'Brien*** test, the ***FW/PBS*** test, or both.

When the Petitioner states that, "this confusion is extensive, rampant, and recurrent" it is clear that various courts' chosen use of the application of these different tests is perfectly appropriate and that the only confusion is that experienced (or tactically asserted) by the Petitioner. Essentially, the sequence of the evaluation is quite simple. First, if it is an appropriate issue for analysis in any given case, the ***O'Brien*** test should be utilized to evaluate any regulation that allegedly infringes on constitutionally protected "symbolic speech," when elements of speech and non-speech are combined in the same course of conduct. This test requires that the regulation (1) is within the

constitutional power of the government; (2) furthers an important or substantial government interest; (3) is unrelated to the suppression of free expression; and (4) is an incidental restriction on alleged First Amendment freedoms, no greater than is essential to the furtherance of that interest. This in no way conflicts with the additional evaluation that, if legislation ultimately passes the ***O'Brien*** test and requires the acquisition of a license or permit prior to engaging in First Amendment protected expressive activities, the procedures set forth for obtaining such a license or permit must contain adequate safeguards to prevent the arbitrary or unjustified delay by a decision maker or, if the decision maker's determination is erroneous, the opportunity for an aggrieved party seeking to engage in protected expression to receive prompt judicial review of such prior restraint. In no way are these tests at odds, and there is no legitimate basis to suggest that there has been any conflict or inconsistency precipitated by their application.

A. Review of the Courts of Appeals' decisions reveals no conflict and no inconsistency.

1. *Third Circuit Court of Appeals*

Petitioner cites the case of ***Mitchell v. Commission on Adult Entertainment Establishments***, 10 F.3d 123 (3d Cir. 1993), as the most recent pronouncement by the Third Circuit concerning the regulation of adult entertainment facilities. It is clear from a review of this case that the appropriate evaluation was used. The district court upheld the constitutionality of the

statute at issue therein under ***Renton***[3], but invalidated the adult entertainment commissions' inaction for more than three years on the plaintiff's application for a new license (after an earlier revocation of a previous license), based on the ***FW/PBS*** two-part procedural safeguard test. The Petitioner goes on to note that, in ***Mitchell,*** the court of appeals analyzed the statute's constitutionality under the ***Renton*** time, place, and manner test and further noted that the court acknowledged that this Court, in adopting the ***O'Brien*** analysis in ***Barnes***, indicated that it *paralleled* the analysis applied in ***Renton*** and that courts considering the constitutionality of adult entertainment ordinances "have applied both ***O'Brien*** and ***Renton***, indicating that the outcome is the same regardless of which analytical framework is applied." (Petition at p. 17). This decision clearly shows that the courts are allowed the necessary tools to evaluate the constitutionality of adult entertainment ordinances and that, while there may be some nebulous variation amongst the tests used, none of the tests are in conflict and the outcomes of those determinations would be the same regardless of which tests are used. There is no conflict. There is no confusion.

2. *Fourth Circuit Court of Appeals*

In discussing the Fourth Circuit, the Petitioner analyzes ***DG Restaurant Corp. v. City of Myrtle Beach***, 953 F.2d 140 (4th Cir. 1992). In that case, a fact specific evaluation led the court to

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[3] ***City of Renton v. Playtime Theatres, Inc.,*** 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) is the keystone case regarding the power of local governments to utilize zoning ordinances to regulate adult entertainment establishments so long as those ordinances are aimed at the adverse secondary effects of such establishments and are not otherwise content based.

conclude that the timing of the enactment of the zoning ordinance at issue therein, with the ultimate effect of a ban on public displays of nudity, created a strong inference that the city's primary concern was to restrict the message purveyed by topless dancing and was thus content based and in violation of the First Amendment. Citing ***Barnes*** and utlilizing the ***O'Brien*** test, the court of appeals set forth a comprehensive analysis of the ordinance, and found that, under the ***O'Brien*** test, the ordinance was constitutional. There was no issue whatsoever regarding the issuance of a license and no discussion whatsoever of ***FW/PBS*** because it simply had no relevance to the case.

Amazingly, following this description, the Petitioner then suggests that the Fourth Circuit "with no discernable reasoning or justification, made a complete about-face, and applied the ***FW/PBS*** test to a zoning ordinance regulating adult entertainment businesses" in the decision of ***11126 Baltimore Blvd., v. Prince George's County, Md.***, 32 F.3d 109 (4th Cir. 1994). In that case, the court evaluated whether or not the ordinance challenged constituted a content neutral time, place, and manner restriction which was narrowly tailored to serve the public's interest in minimizing the secondary effects associated with adult businesses. Once determining that this was true, further evaluation was given to the ordinance to decide whether it comported with the procedural safeguards test set forth in ***FW/PBS,*** because the ordinance had a 150-day time period for a special exception, which was a prerequisite to engaging in the expressive activity at issue.

Once again, there is no conflict in these decisions or in the manner in which they apply the respective tests to evaluate their constitutionality. There is no confusion and the authority cited by

the Petitioner merely sets forth the appropriate sequence of evaluation to determine the constitutionality of ordinances similar to the one at issue herein.

3. *Fifth Circuit Court of Appeals*

In ***Lakeland Lounge v. City of Jackson, Miss.***, 973 F.2d. 1255 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993), the court utilized the ***O'Brien/Renton*** test to determine whether the ordinance at issue therein was content neutral. There was no issue involving whether or not a decision maker could delay the issuance of a license or permit to engage in expressive activity, because the ordinance simply regulated the location of such businesses and did not involve the additional components necessary to invoke an evaluation under ***FW/PBS***.

Again, erroneously confusing the issue, the Petitioner attempts to compare ***Lakeland Lounge*** to ***TK's Video, Inc. v. Renton County, Tex.***, 24 F.3d 705 (5th Cir. 1994) to suggest some type of conflict because the additional use of the ***FW/PBS*** was employed in that case. Clearly the use of the ***FW/PBS*** test was simply the result of the fact that the ***TK's Video*** case involved additional procedures for the review of various applications as a prerequisite to engaging in protected expression. Petitioner suggests that this is an "unusual and confusing twist," but this is entirely inaccurate. The respective tests are nothing more than an appropriate review based on differing characteristics of different ordinances.

The use of these two tests is even more appropriately indicated by Petitioner's referral to ***Grand Brittain, Inc., v. City of Amarillo, Tex.***, 27 F.3d 1068 (5th Cir. 1994). Rather than

"muddy the water," as Petitioner suggests, this case clearly shows the symbiotic nature of the two tests. In ***Grand Brittain,*** the court of appeals considered the constitutionality of the zoning chapter of the city code under the ***O'Brien/Renton*** time place, and manner test, and further evaluated the licensing chapter of the code under the ***FW/PBS*** test. Contrary to what the Petitioner suggests, the court of appeals' utilization of these different tests to evaluate different components of municipal legislation is clearly supported both by this Court's decisions and previous decisions in the Fifth Circuit itself. Indeed, any other type of evaluation would be improper and would clearly fail to recognize the valuable tools that this Court has provided to evaluate legislation such as that at issue herein.

4. *Sixth Circuit Court of Appeals*

Triplette Grille, Inc., v. Akron, Oh., 40 F.3d 129 (6th Cir. 1994), "presented [the court] with the vexing task of divining which of the varied standards enunciated in ***Barnes*** is the law of the land," *id.* at 1233, in order to decide the constitutionality of a city ordinance that prohibited all public nudity.

> "*Barnes* engendered four separate opinions, none of which commanded a majority of the Justices...Justice Souter agreed with the Chief Justice that the Indiana statute was properly analyzed under the four-part *O'Brien* test, [but] he identified material harms, not moral concerns, as the basis for restricting First Amendment protection for expressive conduct."

Id. Under ***Marks v. United States***, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), "the opinion of the Justice

concurring in the judgment on the 'narrowest grounds' should be regarded as the Court's holding." 40 F.3d at 133.

The Petitioner properly identified the Sixth Circuit's evaluation of the ordinance at issue before them under the ***Barnes*** decision. Once again, there was absolutely nothing in the Petitioner's exercise to indicate any conflict, any confusion, or any basis for this Court to issue the writ.

5. *Eighth Circuit Court of Appeals*

In ***Holmberg v. City of Ramsey,*** 12 F.3d 140 (8th Cir. 1993), *cert. denied,* ___ U.S. ___, 115 S.Ct. 59 (1994), the Eighth Circuit evaluated an adult entertainment zoning ordinance under the ***Renton/O'Brien*** test just as they did in ***Ambassador Books & Video, Inc., v. Little Rock, Ark.,*** 20 F.3d 858 (8th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 186 (1994), and ***ILQ Investments, Inc., v. City of Rochester,*** 25 F.3d 1413 (8th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 578 (1994).

In none of these cases was the Eighth Circuit faced with any necessity to evaluate the ordinances for the existence of procedural safeguards under ***FW/PBS*** because the only necessary evaluation was whether the ordinances were content neutral time, place, and manner regulations designed to serve a substantial governmental interest that did not unreasonably limit alternative avenues of communication. ***FW/PBS*** has no relevance in these cases, and it is erroneous to suggest that there is any conflict or confusion created by the Eighth Circuit's actions in the cases cited by Petitioner.

6. *Eleventh Circuit Court of Appeals*

Contrary to the contention by Petitioner that "the Eleventh Circuit has been equally confusing and inconsistent in using the ***O'Brien*** and the ***FW/PBS*** tests," the fact of the matter is that the Eleventh Circuit, just as every other circuit court, properly distinguishes which test is appropriate depending on the characteristics of the legislation to be evaluated. In ***International Eateries of America, Inc., v. Broward County, Fla.***, 941 F.2d 1157 (11th Cir. 1991), *cert, denied*, ___U.S. ___, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992), ***Barnes*** was relied on. There was absolutely no necessity to invoke the ***FW/PBS*** case because there was absolutely no issue involving the decision making process as a prerequisite to engaging in protected expression.

The Petitioner is entirely incorrect in suggesting that the confusion over the application of either the ***O'Brien*** or ***FW/PBS*** tests comprise two different standards with different objectives. The standards enumerated in each test involve the same objective, that being to determine the constitutionality of municipal legislation. The ***O'Brien*** test, as enumerated in ***Barnes***, is used to determine whether or not a time, place, and manner regulation is content neutral, designed to serve a substantial governmental interest, and not unreasonably limiting alternative avenues of communication. The ***FW/PBS*** test determines whether or not such a regulation contains adequate procedural safeguards. The tests are symbiotic in nature, focus on different characteristics of municipal legislation, and will never generate "completely opposite results."

Citing ***Cafe 207, Inc., v. St. Johns County***, 856 F.Supp. 641 (M.D. Fla. 1994), the Petitioner complains that the application of the ***O'Brien*** test as set forth in ***Barnes*** resulted in the finding that the legislation at issue therein was constitutional and that, in the instant case, the circuit court's reliance on the ***FW/PBS*** case in some way contributed to a determination of invalidity that would not have been reached if only the ***O'Brien*** test had been applied to the Citrus County Ordinance. This suggestion totally ignores the critical characteristics of the Citrus County Ordinance that the circuit court readily recognized, easily evaluated, and properly found to be unconstitutional.

In conclusion, the Petitioner fails to see the most important aspect of the circuit court's opinion in the instant case. Regardless of whether an ordinance is content neutral and regardless of whether the ordinance is in all other respects constitutional, if that ordinance requires a license or permit to engage in protected expressive activities, then that ordinance must contain the procedural safeguards set forth in ***FW/PBS***. The Eleventh Circuit reached the correct opinion and the Petitioner is misguided in making any other suggestion whatsoever.

B. This Court has no obligation to resolve erroneously represented "confusion and conflict."

There is no confusion whatsoever in the application utilized by the various circuits of the various tests described herein. There is no lack of uniformity in the decisions amongst the various federal and state courts, and there is no uncertainty whatsoever regarding the application of the ***O'Brien*** or ***FW/PBS*** tests. The law is well settled and quite clear to anyone familiar with the distinct constitutional issues involved in each of the tests.

There is no requirement or necessity for this Court to provide any "authoritative direction," since it has already done so with great clarity and full effectiveness.

The Petitioner's suggestion that the threat of legal assault discourages or jeopardizes governmental entities from enacting legislation to secure the important basic goals of the health, safety, peace, and general welfare of their citizens completely ignores the fact that the entire basis for this responsibility is grounded in the highest embodiment of the public good--the United States Constitution. The Petitioner's arguments, no matter how well intended, will not suffice to insulate legislation which is blatantly unconstitutional. A nation living under the rule of law can accept no other conclusion.

CONCLUSION

Joseph Richard Redner prays that this Court deny Dean's Petition for Writ of Certiorari because the case presents no issue appropriate for this Court's review and because the lower court's holdings were clearly not in error.

Respectfully submitted,

/s/

Luke Charles Lirot, Esquire
2000 Magnolia Drive
Clearwater, FL 34624
(813) 874-2030

No. 94-1427

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Petitioner,

vs.

JOSEPH RICHARD REDNER and ROBERT A. BUTTERWORTH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

RUSSELL W. LaPEER
Counsel of Record
ROBERT R. WHEELER
LANDT, WIECHENS, TROW & LaPEER
Attorneys for Petitioner
P.O. Box 2045
Ocala, Florida 34478-2045
(904) 732-8622

6263
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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ARGUMENT: REPLY REASONS WHY THE WRIT SHOULD BE GRANTED:

I.

THE PERVASIVE DISCORD AND CONFUSION, CONCERNING THE USE OF THE *O'BRIEN*[1] AND/OR *FW/PBS*[2] TEST TO JUDGE THE CONSTITUTIONALITY OF LAWS REGULATING ESTABLISHMENTS DISPLAYING NUDITY, IS MANIFEST BY RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To claim that satisfaction of the *O'Brien* fourfold test (which was approved in *Barnes v. Glen Theater, Inc.*, 501 U.S. __, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1994)) is irrelevant to the case at hand,[3] confirms the confusion and uncertainty concerning the use of that analysis for legislation affecting conduct which involves the display of nudity; and it is inconsistent with Respondent's own position, that both the *O'Brien* and the *FW/PBS* tests should be used to evaluate the constitutionality of an ordinance regulating adult entertainment.

> The Respondent herein does not suggest that Citrus County cannot regulate the activity at issue herein. What he does emphatically submit is that such regulation must first satisfy the *O'Brien* test to justify its very

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1. *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 673, 20 L. Ed. 2d 672 (1988).

2. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 100 S. Ct. 596, 107 L. Ed. 2d 215 (1990).

3. Brief in Opposition, at 16.

> existence.[4] Once this is accomplished, then an appropriate analysis must be undertaken to find that the regulation of expressive activity is governed by the adequate procedural safeguards set forth in FW/PBS v. City of Dallas. The circuit court appropriately undertook this sequence in evaluating the instant case and none of the arguments suggested by the Petitioner, confusing though they may be, in any way justify [sic] the relief requested from this Court.[5]

This suggests that both tests, *O'Brien* and *FW/PBS*, should be used to evaluate the constitutionality of an ordinance regulating adult entertainment. Language, that the *O'Brien* and *FW/PBS* tests "set forth the appropriate sequence of evaluation to determine the constitutionality of ordinances similar to the one at issue herein," again suggests that both tests must be used.[6]

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4. Respondent argues that application of the *O'Brien* test

> [I]n no way conflicts with the additional evaluation that, if legislation ultimately passes the O'Brien test and requires the acquisition of a license or permit prior to engaging in First Amendment protected expressive activities, the procedures set forth for obtaining such a license or permit must contain adequate safeguards . . . [I]n no way are these tests at odds, and there is no legitimate basis to suggest that there has been any conflict or inconsistency precipitated by their application.

Id., at 20.

5. *Id.*, at 16.

6. *Id.*, at 23.

That was not the analytic framework used by the court of appeals in the case at hand, and it is not how many other lower, federal courts have analyzed the constitutionality of such ordinances.[7] This evidences the confusion, discord, and inconsistencies in analyzing the constitutional issues inherent in such ordinances and statutes.

That the Court's decision in *Barnes* allowed for the "barest minimum" of First and Fourteenth Amendment protection for nude dancing "under some circumstances" is not in question. *Barnes v. Glen Theater, Inc.*, 501 U.S. at __, 111 S. Ct. at 2460. More importantly, this Court allowed for the regulation and prohibition of public nudity, while permitting dance, as a form of expression, to continue.

The statement that "[Petitioner's] position conflicts with a long line of this Court's decisions which hold that laws requiring a license to engage in First Amendment activity must be subjected to much more exacting scrutiny than those which license non-expressive conduct," is wide of the goal. In *Barnes*, as in the case at hand, the governmental authority sought to

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7. *See Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 128, 130 n.7 (3d Cir. 1993) (licensing ordinance evaluated under *O'Brien* test); *DG Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 143 (4th Cir. 1992) (ordinance prohibiting public nudity evaluated under *O'Brien* test); *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1255, 1257-60 (5th Cir. 1992) (zoning-permitting ordinance analyzed under *O'Brien/Renton* test); *Triplette Grille, Inc. v. Akron, Oh.*, 40 F.3d 129 (6th Cir. 1994) (ordinance prohibiting all public nudity analyzed under *O'Brien/Renton* test); *Ambassador Books & Video, Inc. v. Little Rock, Ark.*, 20 F.3d 858, 863 (8th Cir.) (zoning ordinance evaluated by *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 186 (1994); *ILO Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1416 (8th Cir.) (zoning ordinance analyzed under *Renton* test), *cert. denied*, __ U.S. __, 115 S. Ct. 578 (1994).

regulate solely the conduct (nudity) and not the expression (dance) which Respondent claims would be deserving of "more exacting scrutiny."[8]

Respondent concedes that the *O'Brien* test should be used to evaluate legislation affecting non-expressive conduct that is combined with an element of expression.[9] That was exactly the factual setting in the case at hand. Citrus County, Florida sought to regulate the conduct (nudity), while allowing for the "expressive element" (dancing).

Respondent also acknowledges that, in the case at hand the court of appeals disregarded the *O'Brien* test, in the belief that this Court's most recent decisions favored analyzing the ordinance's constitutionality under the *FW/PBS* test.

> The instant case is more analogous to another Supreme Court case, *FW/PBS, Inc. v. City of Dallas,* 493, U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). *FW/PBS* is the Supreme Court's most recent pronouncement on the prior restraint of nude dancing. Because it dealt with a licensing scheme similar to the Citrus County Ordinance, it provides us with valuable insight.

Redner v. Dean, 29 F.3d 1495, 1499-1500 (11th Cir. 1994).[10]

But the endeavor to discount the differences between

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8. Brief in Opposition, at 14.

9. *Id.*, at 19.

10. *Id.*, at 15.

O'Brien and *FW/PBS* tests — "there may be some nebulous variation amongst the tests used," but "the outcomes of those determinations would be the same regardless of which tests are used"[11] — is inconsistent with Respondent's apparent, current position that both analytic tests should be used.

It is also intellectually inconceivable. To suggest that a court may apply either one of these two tests to determine the constitutionality of an ordinance regulating adult entertainment, because the end result would necessarily be the same, would eliminate any need for an appropriate sequence of evaluation."[12]

As a practical matter, it also fails to reckon with the very different outcome of constitutional attacks on legislation regulating conduct, when the *O'Brien* test is employed, than under the *FW/PBS* analysis. The outcome of this very case (like that in the decisions from an abundance of other courts of appeals) depends on the Court's use of either the *O'Brien* or the *FW/PBS* test.

This inconsistency in Respondent's analysis exhibits the exact problem which needs to be resolved by this Court — which test (*O'Brien, FW/PBS,* or both) should be used when embarking on a constitutional analysis of legislation governing the display of nudity in adult entertainment businesses.

If the lower court should have employed the *O'Brien* test to judge the constitutionality of the ordinance's restrictions (as have some of the lower federal courts), it did not; and instead it applied the *FW/PBS* test. Direction is needed from this Court regarding the correct test to employ in analyzing the constitutional validity of this kind of legislation.

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11. *Id.*, at 21.

12. *Id.*, at 23.

Respondent acknowledges[13] that some courts[14] have omitted any use of the *FW/PBS* test, and employed the *O'Brien* test, in evaluating the constitutionality of such legislation; while other courts[15] have used the *FW/PBS* test. He fails to offer any explanation why one test would be appropriate in some cases, and another test appropriate for other cases.

> The O'Brien test, as enumerated in Barnes is used to determine whether or not a time, place, and manner regulation is content neutral, designed to serve a substantial governmental interest, and not unreasonable limiting alternative avenues of communication. The FW/PBS test determines whether or not such regulation contains adequate procedural safeguards.[16]

If he now contends that different constitutionality analyses are to be used for zoning legislation, and for licensing-permitting legislation; Respondent immediately encounters problems with that stance: (1) it conflicts with his long-expressed position that the constitutional validity of adult-entertainment legislation is judged by the same first amendment standard, regardless of

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13. *Id.*, at 22.

14. *See DG Restaurant Corp. v. City of Myrtle Beach, supra; Holmberg v. City of Ramsey, supra; Ambassador Book & Video v. Little Rock, Ark., supra; ILO Investments, Inc. v. City of Rochester, supra.*

15. *See 11126 Baltimore Blvd. v. Prince George's County, Md., supra, TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994); *Redner v. Dean, supra.*

16. Brief in Opposition, at 26.

whether that legislation utilizes zoning requirements, licensing-permitting requirements, or both; (2) it fails to account for judging the constitutionality of legislation that contains both zoning and licensing-permitting conditions; and (3) it is inconsistent with the sequential use-of-both-tests argument that Respondent now advocates before this Court.

Simply reciting the elements (albeit only three of the four) of the *O'Brien* test supplies nothing in the way of explanation about why it has been used by some courts in some cases, but the *FW/PBS* test used by other courts in other cases. The confusion stems not from the elements of these two tests, used in varying circumstances, by different courts, to determine the constitutionality of adult-entertainment legislation. It is manifest in the inconsistencies and discord amongst those courts' decisions, concerning which test to apply, and when to apply it. The bottom line is that the *O'Brien* test alone has been used by several courts in upholding the constitutionality of adult-entertainment licensing ordinances; but here the court of appeals ignored that analysis.

CONCLUSION

The thorny problem of analyzing legislation that regulates — or, in some cases, forbids — conduct that is coupled with an element of expressive behavior, will not fade away. Neither will the problem be helped by leaving the divergence of analyses used by courts to decide the constitutional validity of this kind of legislation.

What is needed is what only this Court can provide: a decisive and definitive voice that declares the analytic test(s) to use, and when and how to employ each, when confronted with a constitutional attack on this kind of legislation. Until that guidance is provided by this Court, the disarray amongst the lower courts is sure to continue and to confound the stability that a sure constitutional analysis will afford legislative bodies at every level.

A writ of certiorari is needed, and requested, to do just that.

Respectfully submitted,

RUSSELL W. LaPEER
Counsel of Record
ROBERT R. WHEELER
LANDT, WIECHENS, TROW
& LaPEER
Attorneys for Petitioner
P.O. Box 2045
Ocala, Florida 34478-2045
(904) 732-8622